

# REPORTS:

( A Second Part. )

O F

Diverse Famous CASES in LAW, as they were Argued, as well upon the Bench, by the Reverend and Learned JUDGES, *Coke, Flemming, Hobard, Haughton, Warburton, Winch, Nicholls, Foster, Walmsley, Telverton, Montague, Dodridge*, and diverse others, in their respective Places; as also at the Barr, by the then Judicious Serjeants and Barristers of speciall Note.

Collected by RICHARD BROWNLOW Esq;  
*Prothonotary of the Court of COMMON PLEAS.*

Very beneficiall for all such who are Studious to know LAW, in its Power, Act, and Limitation: *Directive*, and Usefull for all Clerks, Attorneys, &c. In their *Inter-Agendum's*, or severall Ministeriall Functions.

WITH A PERFECT TABLE SHEWING THE  
*Remarkable matters Argued and Concluded in this Book.*

Protag. de Leg. lib. 5.

Θὺς Δίος ὅτι πῶ γένῃ ἀνθρώπων μὴ σπουδοίτο πᾶν; διόρεται  
Διδὸς τὴν δίκην: αἶνα εἴ ἐν πολλῶν κόσμῳ τὴν δίκην καὶ  
φιλίας συνάγων.

L O N D O N,

Printed by Tho: Roycroft, for Matthew Walbancke, at Grays-Inne Gate, and Henry Twyford, in Vine Court  
Middle Temple, 1652.







# TO THE READER.



**U**PON the strict survey of Natures Products, there is nothing to be found, whether in the bosome of its Causes, or in its Singularities, within the Convexity of the Universe, which being contemplated at an intellectuall distance, beyond the Magnetick Effluvium of our Senses, doth not felicitate with more certainty, Nedium, probability, as more obsequious to the Prototype of its projection; then MAN: the very Cronologie of whose Errors doth compute his Existency, an ingratefull returne for the dignity of his Essence, which unmolested and freed from the Procacity of his Junior and Inferior faculties, would have fixt him in the harmonious Orbe of his motion, and have secured him, as well against the scandall of a Planetique, as the Eclipse of his native glory: But alas! the doome is past, Ex Athaniis in Barathrum, hee's now benighted with Ignorance, Phainomena's, and Verities; an Ignis fatuus, and a Linck-boy, are Eodem calculo; which condition imposes upon him something more then Metaphorically, the semblance of a Moth-flye, which is in nothing so solicitous, as in its owne ruine: Neverthelesse had Privation in his Judgement been the onely losse, hee could then have undergone; but his Poco di matto, but his will, and too too ce-reous Potestatives, have Stigmatiz'd him in all his habitudes, undiqueversum, with a more reproachfull Sobriquet of Vellacazo teso, in which shamefull state, forgetting his Constitutive Nature, and rudely breaking through his Divisive difference, he seems now to be lost, if perchance he is not found in the confused

## To the Reader.

Cic. lib. 1. de  
Invent. Rhet.

*Thickets and Forests of his Genus; where measuring his actions (rather Ausa furosa) by the Cubit of his strength, he giddes himselfe into a Maze of Inquietudes, shuffling the Malefactor and Judge into one Chaire, to make up the Riddle of all Injustice; because all things are Just; Hence was the no lesse opportune, then needfull Venu of Cicero's Vir magnus quidem & sapiens, &c. Hence the blissefull emergency of all Laws, the limittin Repagula's of his Insolency, and the Just Admonitions of his Depravity: But Hinc polydacrya, he is yet so unwilling to forgoe his hainefull Appetite (Reasons too potent Competitor) that he is still perswaded he may safely act without controlment; though like a Partridge in a Net, he finds no other Guerdon for his Dussle, then a more hopelesse Irritation: And as if he were damned to be a Fury to himselfe, he will not admit that wholesome and thriving Councell, That Obedience to Laws is a much more thriving peice of Prudence then Sacrifice; and as much differenced as innocency, and guilt ignorant of its expiation. Whence I conceive by a just title; to keep the World from Combats, and the reward of vertue from Violation; the wisest in all Ages have had the priviledge, not onely of prescribing, but of coacting the orders of Regiment amongst others, who by necessary Complot have engaged for observance; which something seems to repaire the loss; yet so, as by our Dianoeticks, we have opportunity enough to see, and like the Satyre in the Fable, to feare, our Idæated Humanity, although in a more sublime contemplation, it may fall out otherwise, in respect that the Law of Essences are more certaine, and of a far more facile direction, then those of existency; which is so necessarily entituled to infinite Incertainty; from Approximation of Accidents, that it would now be an equall madnesse for the Governour to think he can, or the governed to fancie hee should, constitute Laws, Adequate to humane Vellecity, since the wills of no two Sons of Adam did ever Mathematically conceenter, nor were ever two humane Actions shaped with parallel circumstances; which, as it seems necessarily to import the deficiency of the Rule, so also to imply the evident reason of Debating and Reporting of Cases in our Law: And the denoting of Limitations in that of the Empire; which first, properly are, or (a notatione) at least should be, no other then Exceptions to the Rules generall, from a*  
due



## To the Reader.

*due consideration of individuating circumstances. For the Expedition of which knowledge, this Gentleman, the painfull Collector of these ensuing Relations, for his owne benefit, whilst yet living, and for the good of others, who by natures Decree should see his Pyre, did think it Tanti to make his Observations Legible: There now remaines nothing, but thy Boni consule, in which thou wilt oblige the Publisher to continue thy Freind in all like Opportunities.*

R. M. Barr :

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THE  
SECOND PART OF  
BROWNLOWES  
REPORTS

Containing divers excellent Cases and  
Resolutions in Law.

*Lynche against Porter.*



THE Plaintiffe in Prohibition suggests that hee inhabited in *London*, within the Diocesse of the Bishop of *London*, and was cyted to appeare in the Court of the Arches, and was out of the Diocesse of *London*, without licence of the Bishop of *London*, against the Statute of 23. *Henry 8.* And upon the first motion, the Court gave rule to the Defendant to shew cause why the *Prohibition* should

*Prohibition upon the statute of 23. H. 8. Chap. 9.*

not be granted; and to heare the Civilians, and to conferre with them concerning the practise and expounding of the Statute of 23. *H. 8. Chap. 9.* And at the day appointed, three severall Civilians came into the Court, and were heard according to the former Order: and they say, that they use to cyte any Inhabitant that inhabits in *London* to appeare, and to make answer in the Arches originally; for the mischief that the Statute of 23. *H. 8.* intends to prevent, was, that those which inhabite in Dioceses remote from *London* should not be sued here without licence from the Ordinary; but this mischief was not in this case. And Doctor *Martin* saith, that so it was used by the space of 427. years before the making of the Statute, and then was complaint made thereof to the Pope, and he was answered, that it was the use that any man might be cyted to the Arches out of any Diocesse in *England*: and also that the Arch-Bishop may hold his

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Consi-

Consistory in any Diocese within his Jurisdiction and Province: And also that the Arch-Bishop hath concurrent Jurisdiction in the Diocese of every Bishop as well as the Arch-Deacon. And then, if the suit be first begun in the Court of the Arch-Bishop, or the Bishop, or Arch-Deacon, it ought to be there determined where it had its beginning, and shall not be inhibited: And then it was objected by *Cook*, Chief Justice, that the Statute of 23. H. 8. was affirmed by Canon 94. And this sheweth the agreement of the Civilians with the said Statute. And to this Doctor *Martin* answered, that the said Canon was made in the vacancy of the Church of *Canterbury*, for the See of the Arch-Bishoprick was then void: And also he said, that the Arch-Bishop of *Canterbury* prescribes to hold pleas of all things, and of all persons in *England*: And the Pope hath no power to make Canons against the Law, nor against any Custome or Prescription; and for this it shall be void, and that shall not bind the Arch-Bishop which is against the said prescription; and also it seems to the Civilians, that the exposition of the said Statute being the Ecclesiastical Statute appointed to them: And also it was said by them, that this detracts from the Arch-Bishops Jurisdiction against the custome of the Realm, and every Subject hath interest in that: And also that the Bishop takes notice, that they hold pleas of the said cause, and took no exception, and that made a sufficient assent, and amounted to a license in Law, and so concluded that a prohibition ought not to be granted in this Case. *Cook*, Chief Justice saith, that the Statute which the Statute of 23. H. 8. was not only to prevent the mischief that those which inhabited in places remote from *London*, should not be cyted to come to the Court of the Arch-Bishop, but also to give them other privileges, which by the Law they ought to have, that is the Appeal that they loose by the beginning of the Suit in the Arch-Bishop; for they may appeal from the Ordinary after the suit begun here to the Arch-Bishop; which benefit is lost if the suit be begun before the Arch-Bishop originally: and for that the Inhabitants in *London* are as well within the Mischeife as the body of the Act of 23. H. 8. And also that at the making of the said Canon, the Arch-Bishop of *Canterbury* which late was, had the Jurisdiction of the See then committed unto him, he then being Bishop of *London*: So that upon the matter he was Arch-Bishop of *Canterbury*, so that the void of the See of *Canterbury* shall not be avoidance of the said Canon, and he agreed that a Canon against Statute Law, or Common Law, or any Custome, shall not bind the Subject; and agreed, that so it had been adjudged in this Court. But he denied that the exposition of any Statute belonged to the Ecclesiastical Court; for the Statute is meer temporall, though it concern spirituall things, and it shall be expounded according to the Rules of the common Law, see



*Edw. 4. Keasers Case:* And so concludes that this suit was against the Statute of 23. H. 8. For it ought to have its beginning in the Court of the Bishop of London. And this exposition of the Statute is made for the Defendant, 94. Canon, which was expressly made against the Court of Arches, and inflicts suspension (by the space of three moneths upon the Judges which offend against it) from their Office, and awarded that Prohibition shall be granted, and with that agreed *Warburton* and *Foster*, Justices: but *Walmesley* Justice was of contrary opinion, that is, that no Prohibition shall be granted by the Court of Common Pleas, but in case where the Suit is there hanging. And this was objected also by the Civilians, And the opinion of the Judges of the Kings Bench cited to prove it, but prohibition was granted that notwithstanding. And to the objection that the Arch-Bishop of *Canterbury* may have a consistory in the diocese of every Bishop, this was denied but only where he was the Popes Legate, and thence Legate he shall have Jurisdiction of all the Diocese of *England*, &c it was agreed that there were three sorts of Legats. First, Legats, *a Latere*, and these were Cardinals, which were sent, *A Latere* from the Pope. The second, *A Legats* born, and these were the Arch-Bishops of *Canterbury*, *York*, and *Meane*, &c. And these said Legats may cite any man out of any Diocese within their Provincials; then there is a Legate given, and these have Authority by speciall commission from the Pope.

*Daringtons Case.*

*Daringtons Case*, was cited before the high Commissioners of the King, for maintenance of the opinion of *Brownisme*, and for slandering of one Mr. *Eland* a Minister, and also of the Judges of the Common Law, and was sentenced, that for the first he should make his submission before the said Commissioners, and also for the second that he should make submission to Mr. *Eland*, and confesse his offence to him, and pray that he will forgive him; and so for the third also, that he should make submission, and that he shall be committed to prison untill he perform the said sentence, and put in security that he will not hereafter make a Relaps in any of the said offences; and after he made submission for the first offence according to the sentence, and upon complaint to this Court, *Habeas Corpus* was awarded to the Keeper of the Prison, in which he was to bring in his Body, with the cause of his taking and detaining, and he certified the causes aforesaid, but not the Submission; and these were the causes of the taking and detaining of the said *Darington*, and it was prayed by Serjeant *Nicholls*, that he might be delivered, and *Coke* cheife Justice said, that the Ordinary by the common

*Prohibition to the High Commissioners.*

Law, nor by the Statute, *De circumspectis egatis*, cannot imprison for any offence, though it be for Heresie, Schisme, or other erroneous crime whatsoever, and then by the Statute of 5. R. 2. chapter 5. a Statute. It was awarded that Commissions should be directed to the Sheriffs and others, to apprehend such which should be certified by the Prelates to be Preachers of the Heresie; and the Favourers, Maintainers, and abettors, to keep them in strong Prison, untill they will justify themselves by the Law of the holy Church: But this was repealed; by, 5 Ed. 6. 12. And 1 Eliz. 1. And also by the Statute of, 2 H. 4. 15. It was ordained that none shall preach or write any book contrary to the Catholique faith, or determination of holy Church, nor shall make any conventicles of such Sects and wicked Doctrines, nor shall favour such preachers: Every Ordinary may convent before him any person suspect of Heresie. An obstinate Heretick shall be burned in an open place before the People, and this Statute was also repealed by, 25 H. 8. And 1 Eliz. 1. By expresse words, and then by the Statute of, 1. H. 7. 4. Power is given to all Arch-Bishops, Bishops, and other Ordinaries having Ecclesiastical Jurisdictions, to commit Clerks, Preists, &c. To Ward and Prison for Adultery, Fornication, Incest, or any other fleshly Inconvenency, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their Trespas, and these were all the Statutes, which give Authority to the Ordinary to imprison any man. And when the Statute of 1 Eliz. 1. Repealed the first two Statutes of 5 R. 2. 5. and 2 H. 4. 15. It was not the intent that these offences should be unpunished, but the Queen would not leave and trust the Bishop, which was but a man, and when he is made Bishop cannot be removed with such generall and uncontroulable Power, and Authority, and for that this power and Authority was transferred by the said Statute of 1 Eliz. 1. To high Commissioners, which the Queen might countermand at her pleasure, and appoint new, and so it was transferred from one to many, and this Statute did not intend to give other Authority to high Commissioners to imprison any man, which the Ordinary himselfe had not before the making of the Statute of 1 El. 1. And it was not the intent of the makers of the said Statute and Act of 1 Eliz. To alter any Lawes, but to transfer the power of one to others; and it was resolved that for working upon holy dayes, the party shall not be punished before the high Commissioners, in *Reimores Case*, and it was also resolved in *Symsones Case* by the Lord *Anderson* cheife Justice of the Common-place, and *Glaucvile*, they then being Justices of Assise in the same place, that a Pursivant came with a Warrant of the high Commissioners to attach one by his Body for Adultery, in a lay mans house, and was slain, with great deliberation, and conference had with

with the other Judges, that that was no Murder, but Man-slaughter, for they could not attach the Body of any man, but ought to proceed by citation, and excommunication: But it was agreed that they might imprison for *Brownisme*, for that was Heresie, besides he maintaine that if the King do not govern his Subjects as he ought, that his Subjects may and ought to depose him, and other such abominable opinions, and further that he might fine for that, and he said that one *Elyas Brown* was hanged for that in the time of the last Queen, & for that, that it doth not appear by the return that *Darington* hath himselfe conformed, they could not deliver him, for they ought to give credit to the return, according to 9 H. 6. 46. be it true or not, and if it be not true, the party may have his action against the officer which doth it, and it was adjudged in *Fullers* Case in the Kings Bench that the high Commissioners may imprison and impose a fine for Heresie and Schisme, and it was also resolved that Poligamy before the Statute of the 3. of King *James*, was punishable before the high Commissioners, for this was an heynous crime, otherwise the Statute would not have made it Felony, and he said that it was agreed in the time of the last Queen *Elizabeth*, that the high Commissioners should not meddle with any thing but only those five, that is, Heresie, Schisme, Poligamy, Incest, and Recusancy, and with no others, and it was moved that a Writ *De causis admittendis*, lieth, for that they would not allow of the submissions. And the Justice would consider of that, and the Prisoner was remanded, and it was adjourned.

And at an other day it was moved by *Nicholls* Sergeant, that the high Commissioners supposed, for that that the Statute of 5. *El.* gives authority to the Queen, and to her heires and successors, to grant Commission to Visite, Reforme, Redresse, Order, Correct, and amend, all Errours, Heresies, Schismes, Abuses, Offences, Contempts, and Enormities whatsoever; and that the Commissioners may execute all the premises according to the Tenure and effect of the said Letters Patents, that by that they might fine and imprison at their pleasure. But *Coke* cheife Justice said, that it appears by the preamble of the said Statute, that after the Statute was in the 25. yeare of the Raigne of King *Henry* the 8. by which the ancient Jurisdictions, Authorities superiories, and Prehemenences, were united or restored to the Crown, and by meanes of the said Statute, his Subjects were continually kept in good order, and were d shurthened of divers great and intollerable charges and exactions, before that time unlawfully taken and exacted, untill such time as the said Statute of 25. H. 8. was repealed by the Statute of 1. and 2. of *Phillip* and *Mary*, which said Statute of 1. and 2. of *Phillip* and *Mary*, should be repealed and void, by which it appears, that the



the Kings Subjects, were grievously burthened with grievous and intollerable charges and exactions, and yet in this time of usurped power of the Pope, doth not challenge that he might Commit, or Imprison, or Fine in any case, but in the cases especially mentioned in the last Case aforesaid, and for that all the usurped power was annexed to the Imperiall Crown, the which he called the clause of annexing, the second was the clause of deputation, and this was the clause of the Statute, by which the Queen hath power to grant Commission to such persons being naturall borne Subjects, as her Majesty, her Heires, or Successors, shall thinke fit, to Exercise, Use, and Execute, under her Majesty, all manner of Jurisdictions, Priviledges, and Preheminences, in any wise touching or concerning any spirituall Jurisdiction in all her Majesties Dominions, and to Visir, Reforme, Redresse, Order, Correct, and amend all such Errors, Heresies, Schismes, Abuses, Offences, Contempts, and Enormities whatsoever, which by any manner spirituall or Ecclesiasticall power, authority, or Jurisdictions, can or may be lawfully Reformed, Ordered, Redressed, Corrected, Restrained, or amended, and the third he calleth the clause of execution, by which power and authority is given to the Commissioners to Exercise, Use, and execute all the premises according to the Tenure and effect of the said Letters Patents. And it seeme it was not the intention of the Statute, to give any power to the Commissioners, which was not given to the Queen by this Statute, for the clause of deputation shall not be more ample then the clause of annexation, and then the clause of execution refers to the first two clauses, as it appears by the words of that (that is) to use and execute all the premises according to the said Letters Patents, and the premises are expounded by the first clauses, that is, Errors, Heresies, Schismes, &c. And the said Letters Patents, refer all Letters Patents before mentioned, where the persons are appointed to be naturall borne Subjects, and the materiall manner of Jurisdictions, Priviledges, and Preheminences, Ecclesiasticall, Spirituall, and to Visir, Reforme, Order, Redresse, Correct, and Amend all such Errors Heresies, &c. Which by any manner of spirituall or Ecclesiasticall, Power, Authority, or Jurisdiction, can or may lawfully be Reformed, Redressed, Ordered, Corrected, Restrained or Amended, &c. So that it cannot be intended that they may proceed in any other forme, but only according to the Ecclesiasticall power and Jurisdiction and no other, for otherwise they may Fine, Imprison, and ransom any man at their pleasures, which was never intended by the makers of the said Statutes. But only to transfer the Power and Authority, which at that time was in the Bishops, which then were Papistes to the high Commissioners; the  
which

which the King may alter at his pleasure, and so he cannot the Bishops, for they are not displaceable after their consecration.

Michaelmas, 8. Jacobi. 1610. in the Common Place.

A Man was cited before the High Commissioners for Polygamy, which was agreed to be a cause examinable & punishable there: and upon examination of the Cause, the Defendant was acquitted, and yet he was censured to pay costs, though that he was acquitted of the Crime: and this Court was moved for a Prohibition, and it was denied; for they may hold plea of Principall, and then Prohibition shall not be granted for the accessary: and the Lord Coke said, that they have just cause of lawfulness of punishing the offence, though they have not just cause of the Deed, and peradventure it was very suspicious that he was guilty, and for that he hath only God for his revenger.

High Commission.

### Parkers Case.

Three were cyted to appeare in the Court at Chaster for Tenths, and treble damages demanded: and also in the Libell it is suggested, that the Land is barren, and very unfruitfull, and Prohibition was awarded against those jointly, and yet it was agreed, that they ought to count upon the Prohibition severally.

Prohibition.

Fornt prohibitions and severall Counts.

### Penns Case.

Denis Parson of Ryton in the County of Warwick, sued for Tithes in the Ecclesiastical Court before the Ordinary, and the Defendant here pleads that the same Parson was presented upon a Symoniacal contract, and for that his Presentation, Admission, and Institution were void, by the Statute of 21. Eliz. And the Symony was for that, that it was agreed between the said Parson and another man, that was Brother to the Bishop of Lichfield and Coventry, who was Patron of the same Church, That if he should procure three severall grants of three severall next avoydances, as them severally granted, so surrender their said severall grants, and procure the said Bishop to present him when the Church became void (that being then full of an old Parson being greatly sick) that he would make to him a lease of parcell of the Tithes of his Rectory: And the brother of the said Bishop procured the said Grants to surrender their severall grants accordingly (the Church being then full.) And also after when the Church became void, he procured the said Bishop to present him according to the first contract, and then the said Parson made a lease to him

Prohibition upon the statute of Symony upon the stat. of 31. Eliz.

him of the Tithes, and after sued others of his neighbours in the spirituall Court for tithes, who pleaded the said Symoniacall contract, and here *Nicholls* Serjeant suggested, that the Judges Ecclesiasticall would not allow of this Plea there, but the Court would not give credit to this suggestion, but said, that if the Ecclesiasticall Court make exposition of the Statute of, 31 H. 8. Against the intent of it, that then they would grant a Prohibition, or if they should in verity deny to allow of this Plea, and for that advised him that his Clyent might offer this Plea another time to them, and if they denyed to grant that, they would grant a Prohibition.

## Hurney against Boyer.

Prohibition upon the Statute of, 32 H. 8. for the dissolution of the Hospitall of Saint Johns of Jerusalem.

**I**N Prohibition awarded in the spirituall Court for stay of a Suit there for tithes of Lands which were the possessions of the Hospitall of S. Johns of Jerusalem, upon suggestion that the Prior of the said dissolved house of S. Johns had this privilege from Rome which was by diverse Councells and Canons, that is, that the Lands of their Predecessors which by their own hands and costs they did till, they were tied to pay no tithes, and then by the Statute of 31 H. 8. chap. 18. Of dissolutions which was pleaded, but agreed that this Hospitall was not dissolved by this Act but by a speciall act made, 32 H. 8. chapter 24. By which their Corporation and Order was dissolved, and their possessions given to the King, with all the Priviledges and Immunities belonging to that, and the King granted that to the Plaintiff in the prohibition, and if he should hold them discharged of payment of Tithes, was the question; it was urged by *Harris* Serjeant that this Immunity was annexed to the corporation of the Prior and his Brethren of the said Hospitall, and that that was determined by the dissolution of the said Hospitall, and doth not come to the King, and he saith, that so it hath been adjudged in the Kings Bench, against the Booke of 10. *Eliz. Dyer* 277. 60. 2. *Coke* the Bishop of *Winchester* Case 14. B. And the Arch-Bishop of *Canterburie* Case, 47. B. And 18. *Eliz. Dyer* 349. 16. And he said, that it was not given to the King by the Statute of, 31 H. 8. of dissolutions, for that was given by act of parliament, and this was not intended by the Statute of 31 H. 8. As it appears by the Arch-Bishop of *Canterburie* Case. *Nicholls* Serjeant argued to the contrary. And he cited a Canon made by the Councell of *Mag.* and another made by *Insurn* the third. In the year 1513. And diverse others, and also the Statute of, 2. Hen. 4. 4. And 7 Hen. 4. 6. And he said that the Pope had Authority amongst spirituall men, and might grant to them freedoms of speciall things, and he saith, that if Land be discharged of payment of Tithes by prescription of not tithing, and this Land came to the King, yet this priviledge remains, and also he urged, that these priviledges are given to the King by the Statute



Statute of, 31 H. 8. Of diſſolutions, by which all Hoſpitals, as well diſſolved, loſt, ſurrendred, granted, or, &c. To the King, as thoſe hoſpitals which ſhould be diſſolved, loſt, &c. And by this the poſſeſſions, lands, &c. are given to the King in the ſame plight and caſe, as they were in the hands of the hoſpitaillers themſelves; and he affirmed the Booke of 10. Eliz. Dyer 277. 60. To be good Law, and the Archbiſhops of *Canterburie* caſe 2. Coke 47. b. and the Biſhop of *Wincheſters* caſe 44. b. and 18. Eliz. Dyer 349. 16. and alſo the words of the Statute of 32. H. 8. 24. gives to the King, not only the manors, houſes, &c. but alſo all Liberties, Franchiſes, and Priviledges, of what natures, names, or qualities ſoever they be, appertaining or belonging to the ſaid Religion or the Profeſſors thereof, by which he intends that this freedom to be diſcharged of tythes, and ſo concludes that the Prohibition ſhall ſtand, ſee the reſt after, *Eaſter 9. Jacobi.*

## Forde verſus pomroy.

UPON a Prohibition the caſe was this. An unmarried woman being proprietor of a Parſonage, tooke to a Husband, a Pariſhoner within the Pariſh, ſet forth and devided his tythes, and thoſe immediately tooke backe, and the Husband alone ſued for the treble value, according to the Statute of the 2. Ed. 6. And two points were moved. Firſt, if that were a ſezing forth within the Statute, and by the Court that it was not, and ſo hath been adjudged in 43. and 45. of *Eliz.* and 1. *Jacobi.* If the Husband may ſue for the treble value without naming his Wiſe, and to that the Court would be adviſed, for though, that the Husband may ſue alone where a thing is perſonall, for which he ſuerh, as the bookes of 4. Ed. 4. 31. 7. Ed. 4. 6. 15. Ed. 4. 5. and 11. are; yet where the Statute ſaith, that the Proprietor ſhall have ſuit for the not ſezing forth, &c. The Husband is not intended Proprietor as the Statute intends, but the Wiſe, and for that the Wiſe ought to joyne, ſee more.

For not ſezing forth Tythes.

Husband ſuo only.

*Wagginer and Wood, Paſche 8. Jacobi, in the Kings bench.*

WAGGINER ſued WOOD in the Court of Requeſts, for that, that WOOD had eſtopped his way, and in the Bill of complaint, there was no expreſſe of the place, the Countrey, nor to what place the way did lead, and for that it was demurred to the Bill there. And notwithstanding they ordered the defendant WOOD to answer, and the Attorney came and moved the Court for a Prohibition, and

Prohibition to the Court of Requeſts.



and it was granted to him, for they could not determine the right of a way.

## Glover and Wendham.

*Against a For-  
reiner for Or-  
naments for  
the Church and  
for Sextons  
wages.*

**H**endyn of Grege Inna, moved the Court for a Prohibition, and the case was this. A man dwelling in a Parish, that is, Dale, hath land in his occupation in the Parish of Sale, the Wardens of the Church of the Parish of Sale, and other the Parishoners there make a Tax, for the reparation of the Church, for Church ornaments, and for Sextons wages, amounting to the sum of 234. And the Tax of the Church being deducted, cometh but to 34. only. And now the forreigner which dwells in Dale, is sued in the Court Christian, by the wardens of the Church of Sale, for his part of the Tax; and he praiseth Prohibition: and Hendyn saith he well agreed the case of *Jefferies* 5. *Coke*, that he should be charged if this Tax had been for the reparation of the Church only: for this is in nature reall. But when that is joyned with other things, which are in nature personall; as ornaments of the Church, or Sextons wages, with which as it seems he is not chargeable, then Prohibition lies for all; *Flemming* cheife Justice: and *Williams* Justice, thought fit that he should not have a Prohibition: for as well the reparations of the Church as the ornaments of that, are meereley spirituall, with which this Court hath nothing to do, and *Flemming* said, that such Tax is not any charge issuing out of Land as a rent, but every person is taxed according to the value of the land, but *Talverton* and *Fennor* to the contrary, that a Prohibition did lye; for the same diversity which hath been conceived at the Barr; and also they said that he which dwells in another Parish doth not intend to have benefit by the ornaments of the Church, or for the Sextons wages, and for that it was agreed by all, by the cheife Justice; *Williams*, and the others, that if Tax be made for the reparation of Seates of the Church, that a forreiner shall not be taxed for that, because he hath no benefit by them in particuler, and the Court would advise.

Michaelmas, 8. Jacobi, in banco Regis.

*Admiralty.*

**H**enry Talverton moved the Court for a Prohibition to the Admiralty Court: and the case was, there was a bargain made between two Merchants in France; and for not performance of this bargain, one libelled against the other in the Admiralty Court. And upon the Libell it appeared that the bargain was made in *Marcellis* in France,

*France*, and so not upon the deep Sea; and by consequence the Court of Admiralty had nothing to do with it, and *Flemming* cheife Justice would not grant Prohibition; for though the Admiralty Court hath nothing to doe with this matter, yet inso much as this Court cannot hold plea of that (the contract being made in *France*) no Prohibition; but *Telverton* and *Williams*, Justices, to the contrary; for the bargain may be supposed to be made at *Marcellis* in *Kent*; or *Norfolke*, or other County within *England*, and so tryable before us: and it was said, that there were many precedents to that purpose, and day given to search for them. Note, upon a motion for a Prohibition; that if a Parson contract with me by word, for keeping back my owne tithes for 3. or 4. years, this is a good bargain by way of Retayner; and if he sue me for my Tithes in the Ecclesiasticall Court, I shall have a Prohibition upon this Composition. But if he grant to me the Tithes of another, though it be but for a yeare, this is not good, unless it be by Deed, see afterwards.

Contract for  
retaining of  
Tithes.

## Westons Case.

A Merchant hath a Ship taken by a *Spaniard*, being Enemy; and a moneth after an English Merchant with a Ship called little *Richard*, retakes it from the *Spaniard*, and the owner of the Ship sueth for that in the Admiralty Court. And Prohibition was granted; because the Ship was gained by Battaille of an Enemy, and neither the King nor the Admirall, nor the parties to whom the property was before shall have that, according to 7 *Ed. 4. 14. Sec. 2. and 3. Phillip and Mary, Dyer 128. b.*

Admiralty.

Michael. 8. Jacobi. 1610. in the Kings Bench.

A Man sues an Executor for a Legacy in the Spirituall Court; where the Executor becommeth bound by his deed obligatory to the party, to pay that at a certain day, before which this suit was begun in the Spirituall Court; and the Executor moved for a Prohibition, and it was granted, for the Legacy is extinct: but by *Williams*, if the Bond had been made to a stranger, the Legacy is not extinct, *Fenner* seemed that it was so.

Prohibition.

Hillary, 1610. 8. Jacobi, in the Kings Bench.

Robotham and Trevor.

The Bishop of *Londaff* granted the Office of his Chancellor-Ship to Doctor *Trevor*, and one *Griffin*, to be exercised by them, ei-

At the Archde-  
discussed in  
right of Office,

ther

ther jointly or severally: and it was informed by Serjeant *Nicols*, that *Dr. Trevor* for 300*l.* released all his right in the said Office to *Griffin*, so that *Griffin* was the sole Officer, & after died: and that after that the Bishop granted the same Office to one *Robotham*, being a Practitioner in the Civil Law, for his life: And that Doctor *Trevor* surmising that he himselfe was the sole Officer by survivor-ship, made Doctor *Lloyd* his Substitute to execute the said Office for him, and for that, that he was disturbed by *Robotham*, the said Doctor *Trevor* being Substitute to the Judge of the Arches, granted an Inhibition to inhibit the said *Robotham* for the executing of the said Office, and the Libell contains, That one *Robotham* hindered and disturbed Doctor *Lloyd*, so that he could not execute the said Office. And against this proceeding in the Arches, a Prohibition was prayed, and day was given to Doctor *Trevor* to shew cause for why it should not be granted: And they urged that the Office was spirituall, and for that the discussing of the Right of that appertaineth to the Ecclesiastical Courts: But all the Judges agreed, That though the Office was Spirituall, to the exercising of that, yet to the Right it was Temporall, and shall be tryed at the Common Law, for the Party hath a Freehold in this, see 4. and 5. of *Phil. and Mary*, *Dyer*, 252. 9. *Hunt's Case*, for the Office of the Register in the Admiralty, and an Affize brought for that: and so the cheife Justice saith, which was adjudged in the Kings Bench, for the Office of the Register to the Bishop of *Northampton*, between *Skelton* and *Mynors*, which ought to be tryed at the Common Law. And so *Blackeshears Case*, as *Warberton* saith, in this Court for the Office of Chancellor to the Bishop of *Gloucester*, which was all one with the Principall case. And they said that the Office of Chancellor is within the statute of *Edw. 6.* for buying of Offices. And *Warberton* also cited the case of 21. *H. 6.* where action upon the case was maintained, for not maintaining of a Chaplain of the Chamber in the private Chappel of the Plaintiff very well, though it was spirituall, for the Plaintiff hath inheritance in that. But if it had been a parochial Church, otherwise it shall be for the infiniteness of the Suits, for then every Parishoner may have his action: And so in manner of Tything, the prescription is temporall, and this is the cause which shall be tryed at the Common Law, and Prohibition was granted according to the first Rule.

*Hilary 8. Jacobi, in the Common Bench.*

*Prohibition.*

**A**N Attorney of the Kings Bench was sued in the Arches for a Legacy, being Executor, as it seems, and it was urged that he inhabited



habited in the Diocess of *Peterborough*: And for that, that he was here remaining in *London* in the *Term* time, he was sued here, and upon that a *Prohibition* was prayed, and it was granted accordingly; For as the *Lord Coke* said, Though that he were remaining here, yet he was resident and dwelling within the Jurisdiction of the Bishop of *Peterborough*, and he said that if one Lawyer cometh and remaineth during the *Term* in an *Inne* of Court, or one Attorney in an *Inne* of Chancery, but dwelleth in the Country in another Diocesse, he shall not be sued in the Archies,

*Master, Brothers, and Governours of Trinity House  
against Boreman.*

**T**He Master, Brothers, and Governours of Trinity House sue in the Admiralty Court one *Boreman*, for that, that where *Queen Elizabeth* by her Letters Patents under the great Seale of *England*, bearing date the 36. yeare of her Reign, had granted to them the ballasting of all Ships within the *Bridge* of *London* and the Sea, and that no Ship shall take any ballast of any other but of them: And for that that the said *Boreman* hath received Ballast of another within the place aforesaid, hee was sued in the Admiralty Court: And upon that *Prohibition* was prayed; and day being given to hear both parties, the Master of *Trinity-house* came into the Court; and the Judges demanded of him for what end the said Suit was there begun; if it were to have the *Defendants* in Prison, or to have recompence, or for other purpose: But he could not give any answer to that: & upon that the Judges saying, that the place being alleadged to be at *Ratcliffe*, is within the body of the Country without question, and for that for the place, shall be tryed at the common Law. Secondly, the Great Seale and Letters Patents of the King shall be expounded according to the course of the common Law; and the Admiralty cannot punish by Imprisonment, pecuniary punishment, nor otherwise. Thirdly, the Letters Patents are void, for, for that one charge is raised upon the Subject for the private gain of this private house; for they would not ballast any Ship under 3 d. for every tun of Ballast: But if the Letters Patents have been made for publique good, peradventure they had been good, but a *Prohibition* was granted. Note that the said *Boreman* was a *Dutchman*, and his two Ships were arrested and stayed by the Admiralls Warrant out of the said Court, so that he was inforced to find surerities to answer to the said suit, before he could have his Ships at liberty.

*Admiralty for  
staying Ships  
for Ballast.*

*Humly*



*Huntley against Cage.*

High Commis-  
sioners and their  
power in Mini-  
sting Oath  
and taking ob-  
ligation.

**H**ENRY HUNTLEY was Plaintiff in the high commission Court against *Mary Clifford* Widdow Defendant, *Huntley* pretends that he was contracted to the Defendant, and upon that complains to the high Court of Commissioners, and that she would marry her self to *Cage*, and upon that the Arch-Bishop then did grant a Warrant to a Pursivant to attach *Cage*, and the said *Mary Clifford*, and upon that they were arrested by force of the said Warrant, and upon that they were committed to Prison, and being imprisoned, an obligation of 2000*l.* was taken by the said Commissioners of the said *Mary Clifford*, by which she was bound to the King with condition, that she should not marry her self, nor contract to any other, untill the same suit was determined in the same Court, and also to appear before the Judge of the Arches within nine dayes, after notice of that given.

And then being dwelling in *Holborn*, after that Sir *William Strodder* obtained the said obligation of the King, pretending that that was forfeited; for that, that the said *Mary Clifford* had married her self to *Cage*, before that the said suite was ended and determined. And upon that the said *Mary Clifford* was another time cited before the high Commissioners, and a suit was there promoted against her (*Ex officio*) by *Serle* the Kings Proctor, also had the 4th part of all fines and forfeitures which grew to the King by reason of the Ecclesiasticall Courts; and then was articulated against her; first, that she was married or contracted to *Cage*, &c. to that she refused to answer, for that, that it was the direct question upon which the forfeiture of the Bond depended, and then this Article was referred to some Doctors, who upon consideration seemed that the Article ought to be reformed, and upon that the Article was made that she lived single and unmarried in a house with the said *Cage*, which was as much as the first, for shee could not make any direct answer to that, without discovering whether the Bond were forfeited or not, and upon all this matter a Prohibition was prayed to the high commission Court, for the said *Mary Clifford*. And all the Justices, that is, *Coke* cheife Justice, *Walmsley*, *Watson* and *Foster* agreed that the Obligation was void, for that it was taken by duress of imprisonment, for they can not imprison any. Secondly that they ought not to examine any man upon his oath, to make him to betray himself, and to incur any penalty pecuniary or corporall, and *Foster* cited a Judgment in the *Exchequer*, in *Ralph Bowes* Case, where an *English* Bill was exhibited against one for bringing into *England*, Cards without license, and one which had a

Monopo.

Monopoly upon that exhibited the said Bill, and upon that the Defendant demurred in Law upon that, and it was agreed that the Defendant shall not be compelled to answer to that upon his Oath, for that, that he had then incurred the danger of a penall Statute. Thirdly that they cannot take any obligation, by which a man shall be bound to appear in another Court, but only in the Court where the obligation is taken, no more then the Judges of this Court may take obligation of any man to appear before the Councell in the North: And *Walmesley* also seemed, that these high Commissioners ought to meddle only with things of the most high nature, and not of things which concern Matrimonie, and the ordinary Jurisdiction, and *Coge* said that the high Commissioners cannot meddle with any civill causes betwixt party and party, as keeping back tithes, or not payment of a Legacy, and lawfullnesse of Marriage, but the causes with which they intermeddle ought to be criminall, for otherwise they dissolve all ordinary Jurisdiction, and by their sentence every man shall be concluded, for he cannot appeal nor have any other remedy, and also he said that in civill causes, the high Commissioners, cannot send a Pursivant to arrest any man by his Body, for that was adjudged in *Hamptons Case*, 42. *Elix.* By *Anderson* and his companion, Judges in their circuit in the Countie of *Northampton*, with conference had with all the Judges of *England*, where the case was, a Pursivant having a warrant to arrest the body of one for Incontinency, and to have him before the high Commissioners, and a Constable came in aid of the said Pursivant in Execution of his warrant, and was slain, and was adjudged as before, that it was no Murder, and the reason was, for that, that the high Commissioners cannot award any warrant or processe to arrest the Body of any man, but if the warrant had been lawfully awarded, it was agreed that it should be murder, but as this case was, it was resolved to be but Man-slaughter, and also he said they cannot take in civill causes, where they have no Jurisdiction, but in criminall causes where they have Jurisdiction, it seems they may take obligation as the case requires.

But he would not dispute that nor affirm nor disaffirm it, but as the principall case was, the obligation was made by Duresse, and so it may be avoyded, and also he seemed that they could not examine any lay man upon his Oath, But in causes Matrimoniall and Testamentary, and he said that so was the common Law before the making of that Statute of *Articulis cleri.* as it appears by a Canon made by *Ottomon* which was a Legate *A Latere* from the Pope in the 22 *H.* 3. and Canonically, by which is recited, that where such were drawn in length, because that lay men were examined upon their Oathes, and therefore it was provided that lay men should be examined upon their oathes,

Oathes, although it did not concern causes Testamentary nor Matrimoniall, the custome of *England* to the contrary thereof notwithstanding, see *Fitzherberts Natura brevium* 41. a. *Cromptons Justice of Peace* fol. 59. b. *Register* 36. b. and *Hyndes Case* 18. *Elix.* or the Margin in *Scrogs* case *Dyer* 175. b. So also *Lamberts Justice of Peace*, that those things are to be given in Charge by the Justices of Assise, and *Coke* saith that the Writ in the *Register* was framed before the Statute of *Articuli cleri*. And also he cited one *Lees Case*, who was committed for hearing of a Masse, and refused to be examined upon that upon his Oath, and had a prohibition, and so he agreed that a Prohibition should be granted, and upon that it was awarded accordingly.

Note that a Prohibition was granted to the high commission Court, for that, that they examined the lawfullnesse of a Marriage.

### Symonds against Greene.

High Commission  
for Clau-  
destine marri-  
age.

Note one suit was before the high Commissioners, and 16. were brought by Pursivants before them, for that that they were present at a Claudestine marraige, and it was urged, that this was not to be punished, by any inferior Ordinary, in any of their consistories; for the contract was made in the Diocesse of the Bishop of *Worcester*, and the marriage in the Diocesse of *Gloucester*, and the Priest which married them, inhabited in the Diocesse of *Oxford*. And yet Prohibition was awarded, and the Justices were of the opinion, that every of them, for which the Pursivant was sent, might have an action of false imprisonment against him, for they cannot use any other processe but cytation only.

### Admirall Court.

Admiralty  
Court, as a  
thing done be-  
yond Sea shall  
be there tried.

Note that it was urged by *Haughton*, that the intent of the Statute of 13. R. 2. chapter 5. Was not to Inhibite the Admirall Court, to hold Plea of any thing made beyond Sea, but only of things made within the Realme, which pertaines to the common Law, and is not in prejudice of the King or common Law, if he hold plea over the Sea; and that this was the intent of the Statute appeares by the preamble. But to this *Coke* saith, that the office of the Admirall was an ancient office, though it hath been otherwise conceived by some, for he hath seen Records and Libells and proceedings in the time of King *John*, where he was called *Marina Anglie*, in the time of *Ed. 3.* And also he said that the words of the Statute are in the negative. That is, that the Admirall nor his Deputy, doe not meddle from henceforth of any thing done within



within the Realme, but only of things done upon the Sea; and he said that it was adjudged in one *Wrights* case, that a thing made at *Constantinople* shall not be tried in the Admiralty, for it ought to be made upon the deep Sea, otherwise they shall hold no trial of that, see 48. or 50. of *Ed. 3. 2 Ed. 2 F.* obligation, and if a man be slaine or murdered beyond Sea, the offender shall not be punished in the Admiralty: *Walmesly* and *Warburton* Justices, agree, that if a thing be done beyond the Sea, and may be tried by the common law, there the admirall Court shall have no Jurisdiction. But if an obligation beares date beyond Sea, or be so locall that it cannot be tried by the common law there, if the Admirall hold Plea of that, Prohibition shall not be awarded, for it is not to the prejudice of the King, nor of the common law. But if the party can have his remedy by the common law, the common law shall be preferred. And if at the common law one matter comes in question upon a conveyance, or other Instrument made beyond Sea: according to the course of the civill law, or other law of the Nations where it was made; the Judges ought to consult with the Civilians or others which are expert in the same law; and according to their information, give Judgement, though that it be made in such forme, that the common law cannot make any construction of it.

Michaelmas 8. Jacobi 1610. in the common Bench.

**I**F a Parson agree & contract with me, that I shall keep back my own Tithes if that be made after that I have sown my Corn, and for the same year only, this shall be good; and if the Parson sue in the spirituall Court for tithes, I shall have a prohibition; but if it be for more years then one, or before the Corn be sowed, this shall not be good, by *Coke* and *Foster* against *Warburton*, and *Coke* said it was adjudged in the Kings Bench in Parson *Boother* Case, that a contract made with a parishioner for keeping back of his tithes for so many years as he shall be Parson, was not good, and so it was *Wellowes* Case here also, but it was agreed by them all, that such a contract or agreement for the tithes of any other was void, but only of the party himself, which was party to agreement, and that ought to be made by way of keeping them back. See before, *Easter 8. of James*, See 20 H. 6. and the 21. H. 7. 21. b.

Agreement by word to keep back tithes.

Pasche 1611. 9. Jacobi in the Common Bench.

**T**HE question was upon a motion to have a Prohibition to the President and Councell of *Wales*, if that shall be granted without action hanging. And *Coke* cheife Justice said, that the Record of the booke of 38. H. 6. agreed with the Report, and is witnesse,

where a Prohibition shal be granted without Action hanging.

D

John



John Prifett, and 2. Ed. 4. Is adjudged in the point; but yet he advised that there shall be information. *Walmesley* Justice said that this is no action. But *Coke*, *Foster*, and *Warburton* said, that it is an action sufficient, upon which a Prohibition shall be granted, and *Coke* said, that if they hold Plea of a thing, out of their Instructions, he would grant Prohibition without action hanging. But if they proceed in etronious manner, in a thing which is within their Instructions, he would not grant Prohibition without action hanging, or Information.

### Sir William Channeys Case.

High Commis-  
sioners Alimo-  
ny, Adultery.

**S**ir William Channey, was cited before the Ordinary of the Diocese of *Peterburgh*, and sentenced to do Pennance for Adultery; and this he commured, and after that he lived in Adultery with one in his house, and had two Bastards by her, and continued in Adultery with her for many years: and for that he was cited before the high Commissioners, and for that, that he would not allow his wife competent allimony; who had seperated himself from her company, in respect that he lived in Adultery, as aforesaid; and for that, that he refused to become bound to performe the order and the sentence of the high Commissioners, he was committed to the Fleete, and he prayed *Habeas Corpus* for his enlargement, and also a Prohibition to be directed to the high Commissioners; and it was moved by *Nicholls* that fining is not Justifiable by the high Commissioners no more then Imprisonment; he sayd that he was cited out of his Diocese against the Statute of 2. H. 8. The which Statute is commanded to be put in execution by the Stat. of 1. El. Secondly, the offence that is Adultery, is not an Enormious crime, and for that shall not be punished by the high Commissioners, as it appears By the Statute of 1. El. But by the Ordinary. Thirdly, the high Commissioners by the Stat. of 1. El. ought to observe the same course and order in their proceedings that the Ordinary used before the making of the Statute of 1. El. That they could not fine nor Imprison. But he agreed that the Statute 1. H. 7. gives authority to the Ordinary to Imprison for Adultery, but then the person ought to be Ecclesiasticall, so that he agreed, if Sir William Channey had been an Ecclesiasticall person, the Ordinary might Imprison him for Adultery, and for Allimony they ought to give no remedy if the Husband would inhabit together with his wife; as he sayd Sir William Channey desired. But if the Husband refuse to dwell together with his wife, or thrust her out of his house, and will not suffer her to dwell with him, then the Ordinary may compell the Husband to allow allimony for his wife; but the high Commissioners ought not to proceed upon that, for this is

no erroneous crime, for by that the party shall loose his benefit of Appelle, which he hath from the Ordinary, to the Metropolitane, for here the party cannot appeale to any, nor hath any remedy. If the Queen will grant Commission to renewe, and so he concluded that, for that these matters appeare upon the returne of the *Habeas Corpus* to be the causes of his commitment, he praised that Sir William Chancery might be delivered out of Prison: and prohibition of staying the proceedings of the high Commissioners. *Doderidge* the Kings Serjeant for the case of Sir William Chancery argued that the returne consisted of two parts. That is, Adultery and Affimony, and to the manner of the proceedings he would not speake; for he said that the Court had adjudged, that the high Commissioners by the Statute of 1. *Edw.* Ought not to proceed upon any offences, but those which are Enormious; but he intended that the offence at the first was not Enormious, being but Adultery and Affimony, yet when Sir William Chancery was sentenced for that before the Ordinary, and then commuted his penance, and after that lived divers yeares in Adultery with two severall women, and had two Bastards; and then he became Incorrigible, and by consequence the offence is become Enormious, and is properly to be determined before the high Commissioners, and so praised he might be sent backe, and that no Prohibition should be granted; and at another day, *Foster* and *Warburton* said, that the high Commissioners ought not to meddle with these matters. Nor could not Fine nor Imprison for that: But *Walmsley* said that the Statute of 1. *Edw.* Hath referred that to the discretion of the King, and the King by his Commission, hath given them power to meddle with that; and also he seemed that this was an Enormious crime for this is, against an expresse commandment, that is. Thou shalt not commit Adultery, and he intends there can be no greater offence then that, and it seems to him that the word Enormious ought not to be so expounded as it is expounded by the other Judges, that is, an Exorbitant crime, but Enormious is where a thing is made without a rule or against Law, for in every action of trespassse the word is used (*Et alia enormia ei intulit*) and yet these are not intended Exorbitant offences, but other trespassses of the nature of them, which are first expressed particularly, and so the Statute hath been expounded for many yeares, and to the Imprisonment he said, that the high Commissioners have Imprisoned for the space of 20. yeares, and though that the Statute doth not give power to them to Imprison, yet this is contained within the Letters Patents, and the statute hath given power to the King to give to them what authority he pleaseth by his Letters Patents, and for that, that it hath been used for so long

a time he would not suddainly alter that, but gave day till the beginning of the next Term for the argument of that. *Coke* cheif Justice said, that it was agreed by all that the Imprisonment was unlawfull: and if a Person be imprisoned which hath the Priviledge of this Court, this Court may deliver him without Bayle, for the King is the supream head by the Common Law; as to the coercive power, and that the *Letters Patents* of the King cannot give power to imprison, where they cannot imprison by the Common Law, and so it was adjudged in *Symons Case*, 42. *Elix.* Which was cited before the high Commissioners for adultery with *Fists Wife*, and adjudged there that they cannot imprison for that; and he saith that an exposition with the time is the best, and for that see the ninth of *Elix. Dyer*, and the 18 of *Elix.* And also it appears by the Statute of 5. *Elix.* that awards a (*Capias excommunicatum*) which could not be imprisoned before that, and upon this Sir *William Chaucery* was bayled; and after by meditation of the Metropolitane, he was reconciled to his wife, and this was the end of this Businesse.

11th of Pasch 9, Jacobi 1611. in the common Bench.

As yet Urrey against Bowyer.

**H**uston Serjeant argued for the Defendant, the question is, if Lands which were parcell of the Possessions of the Hospitall of Saint *Johns of Jerusalem* should be discharged of tythes by the statute of 31. *H. 8.* or 32. *H. 8.* in the hands of the Patentees, and he seemed that the priviledge was personall and annexed to persons of the said order; for it is confessed, that it came by reason of the order of the *Cisterciens*, as appears by the Canon. The words of which are; that they should hold their lands, &c. Also it appears by the statute of 2. *H. 4.* 4. That it is personall by which it was enacted, that the religious of the order of *Cisterciens*, that had purchased Bills to be discharged; to pay tythes, should be in the state they were before; by which it appears that it is annexed to their persons, and not to their lands, so that their Farmers cannot take benefit of that, Secondly, the priviledge was annexed to this order by canon, which is a thing spiritual, and hath no power to meddle with the lands of any man, but the proceeding of that ought to be by inhibition, or excommunication, see 11. *H. 4.* 47. 19. *H. 6.* 3. This priviledge by the canon which gives that, shall be taken strictly. And so is the opinion of their own expositors, see *Panormitan* Canon 37. So that there is an apparant difference between that and the lands, which came to the King by the statute of 31. *H. 8.* For by that the King is discharged of payment of tythes, and so are his Patentees. It seems to me, that the construction of the Cannon may be



be in another course different from the rules of the common law as it was adjudged in *Buntings case*; that a woman might sue a Divorce without naming her Husband very well, and 21. H. 7. 9. The pleading of the sentence, or other act done in the spiritual Court, differs from the pleading of a temporall act done in temporall Courts, and 34 H. 6. 14. a. Administration was committed upon condition, that if the first Administrator did not come into *England*, that he should have the Administration, which is against the Common Law, for there one authority countermands another: and 42 Ed. 3. 13. A Prior which hath such priviledge to be discharged of Tithes, makes a Feoffment, and his Feoffee payes Tithes to the Prior, and this was of Lands which were parcell of the possessions of Saint *Johns of Jerusalem*, and upon that he inferred that this priviledge is personall, and if it be so, it is determined by dissolution of the order as it is determined in, 21 H. 7. 4. That all Parsonages impropriate to them, by the dissolutions are become presentable and so of these which were annexed to the Templers, for these shall not be transferred to Saint *Johns*, though that the Lands are 3 Ed. 1. 12. By *Herle* accordingly *Fitz. Natura Brevium* 33 K. and, 35. H. 6. 56. Land given in Frankalmaine to Templers and after transferred to Hospitallers of Saint *Johns*, the priviledge of the Tenure is paid, and so shall it be in case of Tithes, being a personall priviledge that shall not be transferred to the King, and to the Statute of 32 H. 8. The generall words of that do not extend to discharge the Land of Tithes, though that the Statute makes mention of Tithes, if there be not a speciall provision by the Statute that the Lands shall be discharged, and this appears by the words of the Statute of, 31. H. 8. where the general words are as generall and beneficiall as the words of this Statute, and yet there is a speciall provision for the discharge of the payment of tithes by which it appears that the general words donot discharge that, and so the general words of 1 Ed. 6. are as larg and beneficiall as the general words of the Statute of 31 H. 8. And yet this shall not discharge the Land of payment of Tithes, and this compared to the Case of the Marquesse of *Winchester*, of a writ of Error, that, that shall not be transferred to the King by Attainder of Land in taile for treason by the Statute of 26 H. 8. or 33 H. 8. And so of rights of action, and so it was adjudged in the time of H. 8. that if the founder of an Abby which hath a Corrody be attaint of Treason, the King shall not have the Corrody; and he agreed that the Hospitall of Saint *Johns of Jerusalem* is a house of Religion for this is agreed by Act of Parliament, and the word Religion mentioned in the Statute more then seventeen times, and also it seems to him that the Statute of 31 H. 8 shall not extend to that, for this gives and establishes Lands which come by grant, surrender, &c.

And

And that shall not be intended those which come by Act of Parliament, no more then the statute of 13 *Eliz.* extends to Bishops, 1. and 2. *Phillip and Mary, Dyer*, 109. 38. The statute of *Westminster* the 2. chap. 41. Which gives (*Contra formam collationis*) to a common person, founder of an Abby, Priory, Hospital, or other house of religion, without speaking expressly of a Bishop; and yet it seems that this extends to an alienation made in Fee simple or Fee taile by the Bishop, 46 *Ed. 3.* Forfeiture 18. But it is resolved in the Bishop of *Canterburies* Case, 2 *Coke* 46, that the statute of 31 H. 8. shall not extend to those lands which come to the K. by the statute of 1 *Ed. 6.* to make them exempt from paying of Tithes, and to the Case in 10. *Eliz.* that is but an opinion conceived, and that the Prior hath this privileged from *Rome*, and that the Farmer shall pay Tithes, and the question was in the *Chancery*; and upon consideration of the statute of, 31 H. 8. It seems that the Patentee himself shall be discharged (as long as by his own hands he tills it) and the statute of, 32 H. 8. Upon which the state of the question truly consists, was not considered, and also it was not there judicially in question. And to the case of *Spurling* against *Graves* in Prohibition, consultation was granted; for that, that the statute was mistaken; and so the award was upon the form of the pleading only, and not upon the matter, and so he concluded, and prays consultation, *Houghton* Sergeant to the contrary, and he agreed that it is a personall priviledge; and if the Order of *St. Johns* had been dissolved by death, that then the priviledge shall be determined, and this appears by the Stat. of 2. H. 4. 4. before cyted: and also the case of 10. *Eliz. Dyer*, 277. 60. did doubt of that: but he relyed upon the manner & words of pleading; that is, that *Hospitallers* are not held to pay Tithes, & it is as a real composition made betwixt the Lord and another Spirituall person, of which the Tenants shall take advantage, as it is resolved in the Bishop of *Winchesters* case. Also as if a man grant a Rent charge, if the Grantee dye without Heir, the grant is determined: But if the Grantee grant that over, and after dyes without Heir, yet the Rent continues, 27. H. 8. Or if Tenant in tayl grant Rent in fee, and dies, the grant is void. But if he after suffers a recovery, or makes a Feoffment, the Rent continues good till the Estate taile be recontinued, as it is resolved in *Capels* case. So here the order of *Templers* hath been determined by death, the priviledge hath been determined, but inso-much that the Land was transferred by *Parliament* to the King, this continues. Also the words of the Statute of 32. H. 8. are apt, not only to transfer all the Interest which the Pryor had in his Lands, but also his Priviledges and Immunities to the King; and he agreed, it is not material if the words *Tithes* are mentioned in the Statute or not. But the word upon which he relyes, and which comprehends this case,

*Houghton.*

case, is the word *Priviledg*, which takes away the Law; for where the Law binds them to pay *Tithes*, the *priviledg* discharges them: And the words of the *Statute* are taken in the most large extent, that is, all Mannors, &c. *Priviledges*, *Immunities*, &c. of what nature, &c. be they *Ecclesiasticall*, or *Temporall*; which appertain and belong, &c. by or in the right of their Religion; but the *Priviledges* and *Immunities* they have in the right of their Religion, and these the *Statute* of 32. H. 8. gives to the King, and there is no cause that they should surmount, or that the *Statute* should give to them more favour then the former *Statute* hath given to those religious houses which were dissolved by the *Statute* of 31. *Elix*. For the *Hospitallers* of S. *Johns* were favourers and maintainers of the Popes Jurisdictions as well as the others, as it appears by the *Statute* of 32. H. 8. Also the words of 32. H. 8. hath only the words of the King and his Successors, and doth not speak of his Assigns, which words are expressed in the *Statute* of 32. H. 8. But it is provided by 32. H. 8. that the King cannot use as his will and pleasure, which amounts to so much. Also the *Statute* of 31. H. 8. extends to all Religious houses by expresse words: and it shall not be intended, that the intent of the makers of the *Statute* was to omit that which were to be of the Order of S. *Johns* of *Jerusalem*, when the mischief was in equal degree. And it hath been agreed that they are religious persons, and that they were under the obedience of the Pope; for so they are described in the *Statute* of 17. R. 2. by which the possessions of the *Templers* was transferred to them; so that on the matter they are religious, which shall not be intended so largely, as every Christian may be said religious, but *Secular*, and *Regular*, which vow Obedience, Chastity, and Poverty; and for the proof of this, he cited a precedent. Also it seems to him that the *Statute* of 30. H. 8. extends to those Lands which come to the King by the *Statute* of 32. H. 8. And it is not like to the Arch-Bishop of *Canterburies* case, 2 *Coke*, 47. upon the *Statute* of 1. *Ed*. 6. For that *Statute* gives the Lands to the King for other causes, and not for the same causes which are contained in the *Statute* of 31. H. 8. But the *Statute* of 32. H. 8. is for the same cause, and with the same respect to Religion. But if these Lands have come to the King by Exchange, or by Attainder, then they shall not be intended to be within the *Statute* of 31. H. 8. But if another *Statute* be made in 32. H. 8. by which all Religious houses have been given to the King, this shall be intended within the *Statute* of 31. H. 8. And the Judges before whom the cause depended judicially, ought not to be ignorant of that, and so he prayed that a *Prohibition* might be. *Shirley* Serjeant for the Defendant, at another day in *Trinity Term* 9. *Jacob*, argued, that the question only depended upon the *Statute* of 32. H. 8. upon which the *Prohibition*

*Shirley.*



*bibition* is founded with the *Statute* of 31. H. 8. by which the Lands of Monasteries are given to the King, do not extend to those Lands which are given after by *Parliament*. But he intended that the Constitution which discharges the Templers of the payment of Tithes is spiritual, and extends only to spiritual persons which may prescribe in nortything; see 38. Ed. 3. 6. 2 of *Coke*, the Bishop of *Windsor* Case, 44. Also he intended when an appropriation was made to the Templers, that this is determined by dissolution of their Order. So upon the *Statute* of H. 5. of Priors Aliens, which have Improprations, or which have Rent issuing out of them; and after the Impropration is dissolved, the Rent is gone, for the Impropration is dissolved. Also he took exception to the pleading, for that, that it is only a branch of the *Statute* of 32. H. 8. And then by vertue of the premises he was seised, which is not good: and so hee concluded, that it was a good cause of demurrer upon the *Prohibition*, and prayed consultation. *Barker* Serjeant for the Plaintiff seems the contrary, and yet he agreed, that he could not take benefit of the *Statute* of 31. H. 8. for that, that these Lands came to the King by another *Statute*, but he relyed upon the words of the 32. H. 8. which was made only for the dissolution of the Hospitall of St. *Johns* of *Jerusalem*: Tithes are as ancient as any thing that the Church hath, and before that any Law was written, for *Abraham* payed Tithes to *Melchisedek*, but it doth not appeare that he paid the tenth part; but Tithes are due by the Judiciall Law of God, and the King hath power to appoint what quantity shall be paid. But at the beginning there were Sacrifices, Oblations, and Tithes And it was ordained by *Edgar*, King of this Realm, that Tithes should be given to the Mother Church. Also *Edmund*, *Ethelstan*, *William* the Conquerour, and the Councell of *Magnus* specially provided that Tithes should be paid, but did not appoint when they should be paid. But the first Law which appointed the quantity was made in the time of *Edw. 1.* and this ordained when they ought to pay the Tenth with the feare of God. And it was resolved in *Fox* and *Crishbrooke* case in the Commentaries, after severance they are temporall, and Action lyes against him which carries them away, as of *Mortuary*, as it is resolved, 10. H. 4. 1. 6. And before the Councell of *Lateran*, every one might pay his Tithes to what person he would, and then were paid to Monasteries as Oblations: But of Tithes which are due to any by prescription, he which payes them hath no such election, but ought to pay them to him which claims them by prescription, 14. H. 4. 17. If a Parson claim Tithes in another Parish as portion of Tithes due by prescription to his Rectory, he ought to shew the place specially. So if Nunns prescribe to have a portion of Tithes, they ought to shew the place, for it is a question if they are spiritual, or not; for their

*Barker.*

office

office is only to pray in their house, 24. *Ed. 3.* So the book of Entries, if a man claim Tithes to his Pupil, he ought to shew in what place the Tithes lye, in the 17. *Ed. 2.* The order of the Templers was dissolved, and their possessions annexed to St. *Johns of Jerusalem*: and they did not claim by any Bull of the Pope, nor other spirituall Canon but by prescription, which is priviledg and private Common law, and this appears by the *Statute of Westminster*, 2 Chap. 47. That is, that they are conservators of his priviledges. Also he saith, that the *Statute of 1. H. 4.* discharges Farmers without speaking of Priviledges. And the *Statute of 7. H. 4. 6.* useth the same words which are contained in the *Stat. of 32. H. 8.* That is, that none shall put in execution any Bulls, containing any priviledges to be discharged of payment of Tithes. And *Mephams Canon* in time of *Ed. 1.* saith, *Let the custome be observed with the feare of God.* And another Canon, That custome of not Tything, or of the manner of Tything, if they paid lesse then the tenth part, see *Panormitan* upon that, seek of the Case between *Jesey and Weeks* in the Exchequer, upon the *Statute of 27. H. 8.* for the dissolution of small Monasteries. Also the Lord *Darcy* in *quo warranto*, was discharged of purveyance by Patent granted by the King *Edward 6.* of such priviledges which such a one had, and by the same reason the King shall be discharged of Tythes by the Act of *Parliament*; also he remembered the Book of 10. *Eliz. Dyer*, 377. 60. to be resolved in the point: and also 18. *Eliz. Dyer*, the Parlon of *Pekerke* case, 399. 18. upon the *Statute of 31. H. 8.* and so concluded, and prayed judgment for the Plaintiffe, and that the *Prohibition* should stand, and it was adjourned.

Trinity 9. *Jacobi*, Priddle against Napper.

UPON a special verdict the cause was, The Prior of *Montagne* was seised of an Advowson, and of divers acres of Land, and the 10. of *H. 8.* the King licensed him to appropriate that; and 21. *H. 8.* the Bishop which was Ordinary assented, and after that, the Church became void, that the Prior might hold it appropriate; and 27. *H. 8.* the Incumbent dyed, so that the Appropriation took effect, and was united to the possession of the Rectory Appropriate, and also of the Land out of which Tythes were due to the said Prior, in respect of the said Rectory, and then the Priory is dissolved, and the Impropration and the Lands also given to the King, by the *Statute of 31. H. 8.* which granted the Impropration to one, and the Lands to another. And if the *Patentee* of the Land shall hold it discharged of the payment of Tythes, in respect of that unity, was the question: And *Harris*, Serjeant for the *Defendant*, in the *Prohibition*, that the unity ought to be perpetuall and lawfull, as it was adjudged.

judged between *Knighley* and *Spencer*, 2 *Coke*, 47. a. cyted in the Arch-Bishop of *Canterbury* case; and for that unity by, or by lease for years, or for two or three years, as in the case at the Barre, shall not be sufficient to make discharge of the payment of Tithes: and so it was adjudged, *Pasche* 40. *Eliz.* *Ry.* 454. between *Chyld* and *Knighley*, that is, that the unity of the possession ought to be at time, that the memory of man doth not run to the contrary. And in the argument of this Case it was said by *Popham* cheif Justice, that no Tithes were paid after the *Statute*, that then it shall be intended, that no Tithes were paid before the *Statute*, and so he concluded, and prayed Consultation, see 2 *Coke* 48. a. The Arch-bishop of *Canterbury* for the reason by which unity of possession is discharged of payments of Tithes, that is, for that, that some houses of Religion were discharged by Bulls of the Pope, and many were founded before the Councell of *Lateran*: and for that it shall be infinite, and in a manner impossible to find by any searches, the means by which they are discharged: the unity is no discharge in respect of it selfe, for the reasons aforesaid, and none may know if Tithes were paid or not before the union: And if Tithes be not paid in time of memory by a house of Religion, and they lesse of that for years, and receive Tithes, then the lease expires two yeares before the Dissolution of the same house, the King shall not be discharged of the payment of Tithes by the *Statute* of 31. H. 8. by *Coke* and *Walmesley*, against *Warburton* and *Poffor*.

### Dormood against Brikkenden.

UPON the *Statute* of 5. Ed. 3. a man libelled in the Spiritual Court for Wood cut, and a Consultation was granted; Yet the Defendant in the Court Christian might have a new *Prohibition*, if it appeared the first Consultation was not duly granted: So if a man libel for Tithes for divers years, and *Prohibition* is granted for part of the years, and after that a Consultation is awarded, yet the Plaintiff may have a new *Prohibition* for the residue of the time, notwithstanding the *Statute* of 30 Ed. 3. and that it be upon one selfe same libel.

### Admirall Court.

Court of Admiralty's Jurisdiction.

NOTE that the Admirall cannot imprison for any offence; but if the Court hath Jurisdiction of the Originall cause, and sentence is there given, this sentence may be executed upon the Land, 19 H. 6. But no Ordinary may meddle out of his own Diocesse, 8. H. 6. 3. H. 7. The Parson of *Salt-ashes* Case; That this Court tooke notice of Jurisdiction of all Ecclesiasticall Courts, and Ordinaries, for they

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write unto them for tryall of Bastardy and Matrimony. And there are 3. Legates, First a borne Legate, as the Arch-bishop of *Canterbury* and *Torkes, Remes*, and *Pylazam*. Second, a *Latere*, as all Cardinals. The third a Legate given, as those which have their Authority, by commission, and *Lynwood* Provinc. saith, that the Arch-Bishop of *Canterbury*, as Arch-Bishop, cannot meddle out of his Diocesse of *Canterbury* and his Peculiars, but as a Legate borne, which is in respect of his Office, he hath prerogative, and if a man inhabit in one Diocesse, and ought to pay tithes to another which inhabits in another Diocesse, there the Ordinary ought to prefer the suit to the Metropolitane, but seek what Ordinary shall transfer it.

Trinity 9. Jacobi 1610. in the Common Bench.

Jones against Boyer.

**H**ENRY Jones Parson of *Bishepton* sued *Bowen* the Executor of *Holland*, the last Incumbent in the Arches for Dilapidations, upon which a Prohibition was prayed upon the statute of, 23. H. 8. for that, that it was sued out of his Diocesse, which was *Saint Davids*, but it appears that the Vicar generall of the same Ordinary hath made generall request to the Metropolitan, to determine that without shewing any cause speciall, and if the inferiour Ordinary may transmit any cause, but only for the causes mentioned in the statute of, 23. H. 8. And if the causes ought to be expressed in the Instrument, was the question: note that the generall words of the statute of, 23 H. 8. chap. 9. *Rassall* Citation 2. are afterwards many particulars, or in case that any Bishop or any inferiour Judge, having under him Jurisdiction in his own right and title, or by commission, make request or instance to the Arch-Bishop, Bishop, or other inferiour Ordinary or Judge, to take, treat, examine, or determine the matter before him or his substitute. And that to be done in case only where the Law civill or Canon doth affirm execution of such request or instance of Jurisdiction, to be lawfull or tollerable, and for the better discussing of this question, the Judges had appointed to heare two Doctors of the Civill Law, which at this day attended the Court; the first Doctor *Martin* said, that these generall words have reference to the Executor, and not to the maker of the request, and this request may be made for all causes, but ought to be made to him, which hath concurrent or immediate Jurisdiction to which appeal may be made, and that the Arch-Bishop hath ordinary Jurisdiction in all the diocesse of his Province; and this is the cause that he may visit, but this Jurisdiction is bound and tied up to the Ordinary, and when he will leave that at large, then the Arch-Bishop may proceed, as he is Arch-Bishop, and the cause of request need not to be contained in the Instrument, for when the power which

which was bound up is unbound and at large, then he may proceed Doctor *Talbot*, that the request is referred to three, to the Bishop, Dean, and Arch-Deacon. And the persons to whom the request is to be made are three: The Arch-Bishop, two Bishops, three, or superior Judge, and the Bishop and his Commissary are all one, and request made by the Commissary shall be as good, as request made by the Bishop himselfe. Also that the President may transmit, and make request to the Emperour; as it appears in the Booke of *Iustinian* of the Lawes, 2. Book. So *Baldus* in reference made of inferior Magistrates to Superiour, doth defend, that the Arch-Bishop is Judge of the whole Province, yet is bound. So *Speculatus* in his Title of *Relations*, of which relation shall be made: So in the Councell of *Amieche*, that the Metropolitan is mediate Judge in the first part of the Canon, and for that relation shall be made to him. *Passomius de officio*, &c. disputes: If the Arch-Bishop may have consistory in the Diocess of the Ordinary. *Hosiensis*, that the Ordinary may transmit a cause, though the parties be unwilling. *Panormitan* in capite *procuratoris*, 8. Question 6. *decretals* of the Canon Law. *Philippus Francus* upon the decretals of the Canon Law, That the Arch-bishop cannot meddle in the Diocess of any Ordinary without his assent. *Dominicus*, upon the same Decretall: And so he concludes; that when the Ordinary makes a request to the Arch-bishop, hee may meddle without the assent of the parties, and the stranger, when the parties assent. And they agreed, that generally the Arch-Deacon ought to transfer to the Bishop, and so the Bishop to the Arch-bishop: But they agreed also that here in *England* it was prescription and usage, that every Arch-Deacon hath used to appeale immediately to the Arch-Bishop, and so ought the Request within this statute to be made accordingly. Also they agreed, that if a man inhabite in one Diocess, he hath cause to sue for Tithes in the same Diocess in which he inhabits: and in another Diocess, there he ought to sue in the Diocess where the *Defendant* did inhabite, and not where the Tithes are payable, nor where the *Plaintiff* inhabits, and the Principall cause was ordered accordingly.

Michaelmas, 1611. 9. *Jacobi*, in the Common Bench.

*Enby* versus *Walcott*.

**T**HE Defendant, was sued before the Ordinary in the County of *Lincoln* for defamation. And the Suit was begun before the last generall pardon; *ex officio*, and the Costs taxed after the time limited by the pardon: and *Prohibition* was granted, in so much that all things promoted, *ex officio*, are discharged by the pardon; and in so much as the principall was pardoned, the Costs being but as accessory, shall be also pardoned, notwithstanding that they were taxed after the pardon.

## Powis against Bowen.

UPON consideration had of Instructions given to the President and Councell of *Wales*, it was resolved by all the Justices of this Court, that the Councell there ought not to proceed upon English Bill, which contains title. But the forme of that ought to be onely, that the *Plaintiff* was in possession for three years: and that the *Defendants*, which ought to be alwayes more then one, riotously, and with force have entred upon him, and so ought to be restored to his possession. And in so much that the Bill contains Title in this case, and that the *Defendants* have entered upon him, and disseised him in forme of Assise, and doth not say riotously and with force, *Prohibition* was granted.

## Butler against Thayer.

THE Lord Admirall granted a Commission under the Seale of the Admirall Court to *Thayer*, for measuring of all the Corne which shall be transported from one Town or place to another within the Creeks, which are within the first Bridges, and to have so much for every bushell measuring, and granted, that if any resisted, to arrest them, and commit them till they had found sureties to appeare in the Admirall Court. And at *Milton*, and *Rainham* in *Kent*, *Thayer* endeavoured to put his Commission in execution, and *Butler* resisted him; and was for that arrested, and sued in the Admirall Court, and for stay of that prayed *Prohibition*, & it was granted, in so much that the Admirall hath not power to meddle with the first Bridges for evill causes, but only for Maymes and death of men: but for causes made upon the high Sea, where the Marriners have the better knowledg in the Common Law, he cannot try that: See the time of *Edw. 1. Avowry*, 19. 8. *Ed. 2. 45. Ed. 3. Stamford*, 51. 7. *R. 2. Statham Trespass*.

## Sir John Watts.

CERTAIN goods of a Subjects of the King of *Spain*, were forfeited upon the high Sea, and after were brought here into *England*, & there sold to Sir *John Watts*: and the goods were attached in the hands of Sir *John Watts* by Process out of the Admiralty, and there a libell was exhibited against the goods remaining in the hands of Sir *John Watts*, and Sir *John Watts* was not made party to the Suit. And Sir *John Watts* prayed a *Prohibition*, in so much that they bought them in open Market: And by this Suit in the Admirall Court, the property will be drawn in question there, where the Suite was prosecuted in the name of *Antonso de Valasco* the *Spanish* Ambassador, Legier here. And *Prohibition* was granted.

Michael.

Admiralty.



Michael. 1611. 9. Jacobi, in the Common Bench.

Jennings against Audley.

*Prohibition.*

**P**rohibition was prayed to the Admirall, and the Libell shewed to the Court, which contained the Contract, was made in the straits of *Mallico*, within the Jurisdiction of the Admiralty, and doth not lay upon the deep Sea. And it was agreed, that in all cases, where the *Defendant* admits the Jurisdiction of the Admirall Court, by pleading there, *Prohibition* shall not be granted, if it do not appear by the *Lybell*, that the act was made out of their Jurisdiction; and that, though that Sentence was given, yet if that appears within the *Libell*, *Prohibition* shall be granted.

Note that a man was sued before the Ordinary in the Diocesse of *Norwich*, for infamous words, and after sentence there given, he appealed to the Arches: and the first sentence being there affirmed, he appealed to the Delegates; and before that the proceedings were transmitted, *Prohibition* was granted by this Court, in so much that the offence was pardoned by generall pardon. But this notwithstanding the Register transmitted the proceedings: And after for his fees due for that, hee exhibited a Bill in the Court of Requests, and *Prohibition* was prayed in this Court for to stay his proceeding there. And it was granted, in so much that the originall ground of the Suit, that is, the infamous words were pardoned by the generall pardon; and for this all the proceedings were erroneous, and their transmitting after. And afterwards the *Prohibition* received willingly; And for these causes *Prohibition* was granted to the Court of Requests.

Thomas Baxter against Thomas Hopes.

**I**N Prohibition the Plaintiff Suggests, that within such a Town was such a custome; that every Inhabitant which maintained a family, and dairy, for manuring his land, and maintenance of his family, have used of time out of memory, &c. to pay tythes of Corn, growing upon his Farm, in kind, and by reason thereof have used to be discharged of after crop, of the said land. And also that they have used to pay tythe milk, and tythe Calves in kind, and by reason thereof have been discharged of tythe of yong and barren Beastes, and the Plaintiff suggested further, that he occupied a Farm and maintained a family, and dairy, for the manurance of that, and maintenance of his family; and hath paid his tythe Corn, and milk, and Calves, in kinde: And for that ought

to be discharged of tythes for the after crop, and for yong and barren Beastes, and for the tenthes of which, suit was begun in the Court Christian, and upon demurrer joyned upon Prohibition, the custome was debated whether it were good or no, and it was moved first by *Houghton* Serjeant for the Defendant, that the custome was not good, insomuch that by that the Plaintiff was not to pay more, then by the Law he ought, for he ought to pay tythe Corne, and milk and Calves, in kind: And this is no more then the Law compells him to do, and this cannot be a consideration to discharge him of other things. For all things which renue ought to pay tythes, of Common Right, as after pasture, and barren Cattrell, and Corne, and milk. And all other things which renue; if it be not good custome to the contrary, which is grounded upon consideration; and then to consider how much consideration shall be valuable in other Cases, and what not: And to that it appears in 9. *Ed.* 4. 18. and 19; in Trespasse upon the Statute of 5. *Rich.* 2. The Defendant pleads accord, that the Plaintiff entred into his land againe, and agreed that that was not barr, insomuch as agreement without satisfaction is not barr, and entry into lands, is no more then he might do without the agreement, and for that it is not good for default of consideration; so in 12. *H.* 7. 15. *a.* in trespass for goods taken; the Defendant pleads arbitrement, that is; for that that the Defendant, hath taken the goods of the Plaintiff, and that he should deliver them to the Plaintiff, in full satisfaction: And agreed that this is no good award, insomuch that this cannot be satisfaction, for that that the goods were the proper goods of the Plaintiff: And although, that he hath his goods againe; yet he is not satisfied for the taking. But if the award had been, that the Defendant should redeliver his goods, and carry them to such a place certain, at his own costs and charges, then it had been good: See 45. *Ed.* 3. accordingly. So in an action upon the Case, upon an Assumpsit made in consideration that the Plaintiff hath payd due debt, is not good, for this is no consideration, and so in the principall Case the Prescription is not good, insomuch that he hath not suggested more or other consideration, which by the Law he ought to do: But he agreed that if he had suggested, that the Plaintiff, had plowed and manured the land, and disposed of the tythes of the Corn, for the benefit of the Parson, in other manner then the Law compelled him; then the first prescription had been good, and so he concluded, and praied Judgement for the Defendant: *Hutton* Serjeant for the Plaintiff, in the Prohibition seems the contrary, and that the Suggestion, and Prescription, and Custome, Contained in that are good: And to the Objection, that it is

no consideration, that the Custome may be founded; he intended that this is a ground upon immunity subsequent to the Consideration, as of things which are not tythable, as in the general Case of things, which are for the maintenance of the family; for Plowing and Manuring of the land, shall not pay tythes; as in a suit for tythes for herbage, suggestion that they were depastured, by labouring Cattell, which Plowed and Manured the Land, of which the Parson had tythes, or small Wood, which are cut or employed for the fencing of a Farm, or fuell spent in the Farme, shall not pay tythes; insomuch that without that the Farme cannot be Manured nor the Family sustained. And so by consequence the Parson shall not have any tythe Corn, insomuch that no Corn will grow without manuring; and also the Parson by those hath the more ryth Corn, and so he hath consideration in that, for the better that the Farme is fenced and manured the more tythe the Parson shall have: So the Farmer may be discharged of tythes, for Rakeings, insomuch that he Mowes and Gocks the tythes for the Parson at his own costs, and this is sufficient consideration: And also he insisted upon the Statute of *Ed. 6.* Which provides that tythes shall be payd in the same manner, as they were payd for 40. yeares before, and he cited one *Jessopps* case to be adjudged in Prohibition; Pasche 36. *Eliz.* Upon suit in Court Christian, for flocks, and locks of Wooll: And the Custome was alleged, that the owner had woond the tythe for the Parson, and in consideration of that, ought to be discharged of tythes, of locks and flocks, if they be, not made by Covin, to defraud the Parson; and these were demanded by the name of wooll dispersed, and 18. *Eliz.*; it was adjudged, that tythes shall not be made for Brick, and in Prohibition; the suggestion was grounded upon the generall immunity, and insomuch that it was made of land, for which no tythes are to be payd; insomuch that it doth not renew, that for this cause tythes ought not to be payd, for the Brick which is made of that, and so of Mynes, and so Loppings, and Toppings, and bark of Trees shall pay no tythes: But are within the Statute of 40. *Eliz.* 5. of wood to be false, as it is resolved in *Soby and Molyns* case in the Commentaries: And he agreed that for herbage the tenth gate, or profit of that ought to be payd, if there be not a custome to the contrary; but in the Principall case he intended that that was payd in the Corn, and in that the Parson hath recompence and consideration as before, and so he concludes and prajes Judgment for the Plaintiff: *Dunrigde* Serjeant of the King argued that the Custome is not good, as it is here suggested, for the consideration is of some thing which ought to pay tythes in kind, and so upon the matter is no consideration.



consideration at all, for he intended that tythes should be due by divine right, as due by the Mannring and Tillage of the occupier, in whose soever hands that the land commeth; if it be not in the hands of the Parson himselfe, 30 H. 8. 43. *Dyer*. 20. And for that a Parson shall have tythes against his own Feoffment, 43. *Ed. 3* 13 *a. 1. Coke. Albany's case*, 111. *a. 32 H. 8. B.* Tythes the 17 accordingly, and unity of possession shall not extinguish them: And also he intended there are two manner of persons, which are discharged of payment of tythes. One Spirituall, the other Temporall, the spirituall in respect of their Order, and the temporall in respect of Custome and Prescription, and also by grant, as it is agreed in the Arch-Bishop of *Canterburies Case*, 2. *Coke*; but this is in the case of a spirituall man before the Statute of, 32 H. 8. which was capable of them in taking, and that he might prescribe in not Tithing, but a lay man cannot be discharged but for satisfaction and consideration, for he cannot prescribe in not Tithing, and for that in the case here the thing to be considered is, if it be sufficient satisfaction and consideration, and to that he intended that the payment of a duty, that is Tyth Corne and Tyth Hay, cannot be satisfaction & consideration for another duty, and this was the Reason of *Piggot & Hernes Case*, that the Lord of a Mannor, in consideration of 20. Nobles yearly paid to the Parson, prescribes to have the tithes of a Hamlet, and in consideration of that, the Lord himself and his Tenants, were discharged of payment of Tithes, but there the consideration and satisfaction was the cause which made the custome good, see 2. *Coke* 45. *a.* And then he proceeded and examined the manner of the satisfaction in the principall case, which is, that the Plaintiff shall pay tyth Corne and Hay, and nothing for Milk and Calves, but by reason thereof shall be discharged, as if he should say, that because he payeth tythe Corne, therefore he shall pay no tythe Milk, and he intended that the nature of satisfaction is to give content to the party, as if the prescription had been, that the Plaintiff should pay so much Money, and in consideration of that, or that he shall make the tythe in Cocks, or rake it, or mow it at his owne charge, this is a good prescription, and there are diverse presidents of that, but no president is of this forme, as the case here is; for money shall be intended the greater value, and more beneficiall for the Parson, then his Tithes in kind, and Money is the value of every thing, and may give contentment to the party which receives it, & he cited Bookes of, 9. *Ed. 4.* 19. and 12 H. 7. 15. and 21 H. 5. 2. *a.* To the same intent which were cited before by *Haughton*, that is, which agree in Arbitrement, and the Plaintiff entred into his own Land, or that the Defendant delivered to the Plaintiff, his own goods which the Defendant had taken from him, it is not good,

*Modus decimandi.*

for it cannot give contentment to the party, otherwise it is, if it be that the Defendant shall carry them to another place and there shall deliver them, for it cannot be satisfaction and contentment to the party, and for that, that here the Plaintiff hath not made more then the Law compells him, and that it was his own duty, and for that the prescription wants consideration, it shall not be good, and also by reason thereof it can be no good discharge, for this cannot be satisfaction, but he said, it was adjudged *Pasch 20 Jacobi* between *Hall* and *Anbery*, that Money was a good consideration and satisfaction for tithes, and so he concluded and prayed judgment for the Defendant; note that this cause was adjudged *Hillary 8. Jacobi* upon solemn argument by all the Judges with one voice, that the Prescription was good.

*Haughton* Serjeant moved for a Prohibition, for that the Suit was begun in the Admirall Court upon Charter party made beyond Sea upon the Land, and Prohibition was granted, though it be for a thing made in *Paris*, or in another place beyond the sea, if it be not upon the Main Sea, but if the Defendant there admits the Jurisdiction of the Court and suffers sentence, then the Court will not upon a bare surmise grant a Prohibition, after the admittance of the party himself, if it be not in a thing which appeareth within the Libell, that is, that the Act was not made within the Jurisdiction of the Sea, and to this difference all the Court agreed.

Prohibition to  
a Court Baron.

If a Court Baron divide a Debt of thirty pound in severall parcels under forty shillings, and so proceeds in severall Actions, Prohibition shall be granted, see *Fitzherberts Natura brevium*, and 19 H. 6.

*Hane* was cited out of his Diocese into the Arches, and he pleaded to the Libell, and sentence is given against him for costs, and after that Prohibition was granted, and upon that consultation was prayed, for that, that the Defendant was the party grieved, and ought to have pleaded the Statute, insomuch that the Statute was made for his benefit, but if it appears by the Libell that the Court of Arches need not to have Jurisdiction, then it seems that the Prohibition was well granted, as in *Sir Henry Vinors Case*, he began a suit in the high Commission Court, for the not serving of a Chappell, and the Court understanding that they had no Jurisdiction, remitted the cause to the Ordinary, and yet gave sentence against *Sir Henry Vinor* which was Plaintiff for Costs, and for that he prayed a prohibition and it was granted to his Petition notwithstanding that he himself was the party, who began the suit there, as it was remembered by *Nicholls* Serjeant.

A Woman sued in the spirituall Court for Defamation, and the words

words were, That thou mayest be an honest woman but thou playest too much with a thing, &c. And Prohibition was prayed, inasmuch that these words were not Actionable; for in *Spellmans* reports Prohibition was granted, for that they proceeded there for calling a Minister Knave Preist, and also by these words, a white Cloake is more siter then a black cloake for him, for action upon the case doth not lye for these words by any Law, but the Prohibition was not granted.

## Pasch. II. Jacobi Prohibition.

## Tey against Cox.

**P**rohibition was prayed, for that, that one was cited out of his Diocesse before the Arch-Bishop of *Canterbury*, as Keeper of the Spiritualities in time of the vacation of the Bishopp-*rick*, and it was denied; but if he had beene to appeare before him as Metropolitane, otherwise it should have been, inasmuch that this is against the Statute of 23. H. 8. And also for his own Canon, but in this case the Statute of, 23 H. 8. And also their own Canon; but in this case the Arch-Bishop hath done as he ought, and for that the Prohibition was denied, see 17 Ed. 2. Fitz. N. B. Bro. 822. and 41 Affs.

The case was this, there was a custome that a Park hath paid two shillings a yeare, and the sholder of every Deere which was killed for tithes, and in consideration of that, had been time out of minde, &c. Discharged of Tithes; and now the Park is dis-parked; and it was moved by *Harris* Serjeant, that this dissolves the custome, for when part of the custome is dissolved by the party himself, this determines the residue, for it is adjudged if the Land be discharged of tithes by reall Composition, then if he sue for tithes in the spiritual Court, prohibition by the common Law was granted, without other suggestion, but only that he sued there for Lay Fee, and it was said that it was adjudged 5. Jacobi, that where it was a custome that so many of the bucks shall be paid for tithes in such a park yearly, and after the park shall be dis-parked, yet that remains discharged of Tithes; and the custome remains, and *Coke* cheif Justice seemed that tithes are due by divine right, but not what part, for if the tenth part be due by divine right, then all Customes are void.



Trinity, 11. Jacobi, 1612. in the common Bench.

**N**Ote by the Statute of 50. Edw. 3. If a Consultation be once duly granted, no new *Prohibition* shall be afterwards granted upon the said Libell. But if it be apparent matter that the first was unduly granted, then a new *Prohibition* may be granted by the whole Court, and with this agreed the book of *Entries* in the Title of *Prohibition*: But this is to be intended to the Spirituall Judge; and it seems that the Admirall is out of this Statute, see 22. H. 7.

Bushes Case.

**N**Ote that it was agreed in this Case, that if a Parsonage be impropriate, and the Vicaridge be endowed, and difference be between the Parson and the Vicar concerning the endowment, that shall be tryed by the Ordinary, for the persons and the cause also are spirituall: And there the Vicar sues the Parson for *Tythes*, and he suggests the manner of *tything*, and prays a *Prohibition*, and it was granted, and after upon solemn argument, *Consultation* was granted, in so much that the manner of *tything* did not come in question; but the Endowment of the Vicaridge only, for that is the Elder Brother, as the Lord Chief said, and this was tryed to be adjudged by *Coke*.

*Prohibition. Agars Case.*

**A**Gar of Kingston upon the Thames was sued in the Ecclesiastical Court for beating of his Wife, and for calling her Whore, and was sentenced by them to pay to his Wife three Shillings a weeke for her Alimony, and divers Fynes were imposed upon him for not performing of that, and also provided that hee should enter into a Recognizance for performance of that, and a *Prohibition* was granted, and also a *Habeas Corpus* to deliver *Agar* out of Prison.

Michael. 8. Jacobi, Blackdens Case.

**B**lackden married one within age, and after disagreed, so that they might marry else-where; and the first Wife had Issue by other Husbands, and dyed, and *Blackden* was sued in the Ecclesiastical Court by an Informer, supposing he had married a woman, living his other Wife. And *Blackden* proves there the disagreement, by which he had sentence for him against the Informer, and yet hee was taxed to give to the Informer twenty markes for costs, which hee refused to pay, and moved to have a *Prohibition*, which was granted.

For

For it was injustice to allow Costs to one which had vexed him without cause, and when they had given sentence against the Informer.

*Parker's Case, Michael. 8. Jacobi*

**P**arker being a Parson of a Church, was deprived by the High Commissioners for Drunkenness, and moved for *Prohibition*, but it was not granted; and he was directed to have action for the Tythe, and upon that the validity of the Sentence shall be drawn in question.

*Doctor Conway's Case, Michael. 8. Jacobi.*

**C**onway and his Wife were sued before the High Commissioners, that is to say, the Wife for Adultery with Sir Michael Blunt, and the Husband for connivency to that, as a Writall, and they were sentenced there for that, and costs taxed in July; and after the general pardon came, and pardoned all offences before the 9. day of November before, and upon that the Doctor moved for *Prohibition*, and had that, because the offences were not enormous crimes, and the Statute, and the Commission upon that is to give power to them to proceed upon enormous crimes, and to Fyne and Imprison for them. Also resolved that the general pardon hath discharged the Costs, though that the Costs were taxed before the Pardon was in Print. And this by the relation that hee had at the day before the Costs were taxed.

*Cradocke's Case, Michael. 7. Jacobi.*

**C**radocke bought diverse things upon the body of the County, which concerned the furnishing of a Ship, as Cordage, Powder, and Shot, and the party of whom they were bought sued Cradocke for the money in the Admirall Court, and *Prohibition* was granted: for the Statute of Richard 2. is, that the Admirall shall not meddle with things made within the Realm, but only of things made upon the Sea, and that no Contract made upon the Land shall be held there. And here the Contract was at St. Katherine's Slatts in the body of the County: for it was said that St. Katherine's is within London, and the Mayor of London hath jurisdiction upon the Thames as farre as Wapping. And if a Murder be committed upon the Thames, this shall not be tryed by the Admirall: and here Terry and Peacock's Case was cyted, which is related in *Wigham's* case in the 3. Reports, and also in Sir Henry Constables Case in the 5. Reports, and it was cyted to be adjudged, that if a Contract be made at Roan in France, that shall not be tryed in the Admirall Court, for that it was made, upon the Land, and not upon the high Sea.

*Pasch.*

*Pasche 8. Jacobi Regis, Common Bench.*

*Gaudyes case with Doctor Newman.*

**T**HE Parishioners of the Parish of *Alphage* in *Canterbury*, prescribed to have the Nomination and election of their Parish Clark, and the Parson of the Parish by force of a Canon, upon voidance of the place of the Parish Clark elected one to the Office; the parishioners by force of their Custome elected *Cundy*, the Parson supposing this election to be Irregular, for that it was against the Canon; sued *Cundy* before Doctor *Newman* Chancellor of *Canterbury*, and the said *Cundy* was by Sentence deprived of the Clark-ship of the Parish, and the Clark of the Parish admitted; *Cundy* moved for a Prohibition, and had it granted by all the Court, for it was held that one Parish Clark is a meek lay man, and ought to be deprived by them that put him in, and no others; and if the Ecclesiasticall Court meddle with deprivation of the Parish Clark they incur a Premunire, and the Canon which willeth that the Parson shall have election of the Parish Clark, is meere void to take away the Custome that any Parish had to elect him. See the Statute of 25 *H. 8.* That a Canon against Common Law confounds the Roiall Prerogative of the King, or Law of God, is void; and Custome of the Realme cannot be taken away but by act of Parliament. See 21 *Ed. 4.* 44 the Abbot of *Saint Albones* hath a Charter of the King, to be discharged of Collection of tenthes granted by Parliament or Convocation: The Clergy grants tythes in Convocation, there is a clause in the grant that no one of them who shall be chosen to be collector, shall be discharged of collection by colour or force of any Letters Patents, and after they return the Abbot of *St. Albones* Collector, who pleads his Letters Patents in discharge of Collector, and resolved by the Court that the clause in the grant of tenthes doth not take away the exemption of discharge by the Letters Patents granted. And it was resolved that if the Parish clark misdemene himselfe in his office, or in the Church; he may be sentenced for that in the Ecclesiasticall court to Excommunication, but not to Deprivation: And after Prohibition was granted by all the court, and held also that a Prohibition lyeth as well after sentence as before.

*Trinity 8. Jacobi, Common Bench.*

**O**N was cited to appear in the Prerogative Court of *Canterbury*, which was out of the Diocesse of *Canterbury*; and upon that



he praied Prohibition upon the Statute of 32. H. 8. Which willett  
that none shall be cited to appeare out of his Dioceffe, without  
assent of the Bishop, and Prohibition was granted: And yet it was  
said that in the time of H. 8; and Reigpe of Mary, that the  
Arch Bishops of Canterbury had used to cite any man dwelling  
out of his Dioceffe, and within any Dioceffe within his Province,  
to appeare before him in the Prerogative Court, and this without  
the assent of the Ordinary of the Dioceffe: But it was resolved  
by the Court, that this was by force of the power Legatine of the  
Arch-Bishop, that as *Lynwood* saith, ought to be expressed in the  
Prohibition, for the Arch-Bishop of Canterbury, York, Pisa,  
and Reymes were *Legati nati*, and others but *Legates a La-*  
*tere*.



Hillary, 1610. 8. Jacobi, in the Common Bench.

Beareblock against Reade.

**I**N an Action of Debt brought by *Beareblocke* against *Reade*, Ad-  
ministratrix to her Husband, upon a Judgement given in this  
Court: The case was this, the Plaintiffe had Judgement against  
the Husband, and after sued him to an *Utlagary*, and upon that he  
brought a Writ of Errour, and removed the Record into the Kings  
Bench, and reversed the Judgement for the *Utlagary*. But the first  
Judgement was affirmed; and then the Husband acknowledged a *Sta-*  
*tute*, and dyed: And the Wife took out Letters of Administration,  
and then the *Statute* is extended against the Wife, and all the goods  
which shee had of the Intestates taken in execution. After which  
*Beareblock* in the Kings Bench sueth a *Scirefacias* upon the said Judg-  
ment against the said Administratrix, to have execution, and shee  
pleads upon that, the said *Statute* in Barre, and the extent of that,  
and that more then that, shee hath nothing to satisfie, and this was  
adjudged a good plea. And then the Plaintiffe being not satisfied,  
he brought an action of debt upon the said Judgement in this Court,  
and in Barr of that, the Wife pleaded all this matter in Barr, as afore-  
said, upon which the Plaintiffe demurred in Law, and the Judges  
seemed to incline that this was no Barr; for though that the Wife  
hath not any means to aide her selfe, or to prevent the extent of the  
*Statute*, yet it seemed to them that this should not prevent the  
execution.

execution upon the Judgement, and that the Wife might have *Actio in quarrel* against the Connusee of the *Searates*; and so to make the extent void. It was not argued at this day, but the point only opened; see 3. *Eliz. Dyer*, 7. H. 6. See *Pafche* 9. *Jacobi*, the Residue.

*Petty against Evans.*

**I**N an *Ejectione firme* brought by the Lessee of a Copy-holder, it is sufficient that the count be general without any mention of the License, & if the Defendant plead not guilty, then the Plaintiff ought to shew the License in Evidence: But if the Defendant plead specially, then the Plaintiff ought to plead the License certainly in his replication, and the time and place when it was made: and in this case the Plaintiff replied, that the copy-holder by License first then had of the Lord did demise, and did not shew what estate the Lord had, nor the place nor time when it was made, and all the Justices agreed that it is not good: For the License is traversable, for if a copy-holder without License of the Lord make a Lease for yeares. The lessee which enters by colour of that, is a Disseisor and a Disseisor cannot maintain an *Ejectione Firme*, and the Defendant cannot plead that the Plaintiff by license did not demise, for this is a pregnant negative, also it ought to appeare what estate the Lord had, for he cannot give license to make a lease of longer time in the Tenancy then he hath in the signiory: And for that if he be Lessee for life of a Mannor, and he licenses a copy-holder to make a Lease for 21. yeares of a copy-hold, and then the Lessee for life dies, the license is for that determined, though that the copy-holder be of Inheritance, for the Inheritance of the Lord is bound by that. And for that the Plaintiff replies, that the copy-holder by license of the Lord first therefore had made the Lease, that is not good by *Coke* and *Walmesley* expressly, and though that the Defendant confesse the Replication, by Implication, by pleading. Yet this shall not ayd the Plaintiff, for that it is insufficiently pleaded, which note.

*Hillary 8. Jacobi 1610. in the Common Bench.*

**I**N action upon the case upon an Assumpsit, the Plaintiff counts that when he such a day at the speciall instance and request of the Defendant, lent to the Defendant the same day ten pound; And that the Defendant the same day in consideration thereof assumed and promised to the Plaintiff to pay the same sum of ten pound at an other day to come: And it was moved in arrest of  
Judge.

Judgement, that the consideration was too generall, and for that the action not maintainable, and all the Justices but *Foster* seemed the consideration was good, but *Foster* it seems was in some doubt of that, but Judgement was entred for the Plaintiff according to the verdict: And *Coke* cheife Justice said, that such a like action was maintained against *Kercher* his Chaplain, as Executor of his Father, and it seems for good Law.

## Legates Case.

ONE Legate was committed to *Newgate* Prison for Arrianisme for denying of the Trinity, by the high Commissioners: and it was moved on the behalfe of Legate to have a *habeas Corpus* and it was granted, and it was said by *Coke* cheife Justice, that the Statute of 5. H. 4. Chapter 10. Inhibits Justices of peace to commit any man to any private Prison. And it seemes if any do against this Statute, that an action of false Imprisonment lies: For every one ought to be committed to the Common Goal, to the intent that he may be delivered at the next Goale delivery, and also if any be committed to any of the Counters in *London*, unless that it be for debt, that an action of false Imprisonment lieth for that, for these are private Prisons, for the Sheriffes of *London* for Debt only.

Note in Debt for ten pound the Defendant confesseth five pound, and for the other five pound pleades that he oweth nothing by the Law, and at the day the Plaintiff would have been nonsuited. And it was agreed by all, that if he be nonsuited, that he shall loose all, as well the debt confessed as the other.

Note the yeare of the Reigne of the King was mistaken in the Record of *nisi prius*, but the Record which remains in the Court was very well, and it was amended: For inso much that it was a sufficient and certaine Issue, this was sufficient Authority to the Justices of *nisi prius* to proceed, but nothing being mistaken but the yeare of the Reigne, this shall be amended, for it is only the misprision of the Clark, see *Dyer* 260. 24, 25. 9. *Eliz.* 11. H. 6.

Note also if Tenant in Dower be disseised, and the Disseisor makes a Feoffment, the Tenant in dower shall recover a l their dammages against the Feoffee, for she is not within the Statute of *Gloster* chapter 1. By which every one shall answer for their time.



Hilary 8. Jacobi 1611. in the Common Bench.

Reyner against Poell; See Hilary 6. Jacobi fol:

IN second deliverance for copy-hold in *Bradston*, in the County of *Huntington*; the case was, copy-hold Lands were surrendered to the use of a woman, and the Heires of her Body, and she took a Husband, the Husband and the Wife have Issue 2. Sonnes, and after Surrenders to themselves for their lives, the remainder to the eldest Son and his Wife in fee, the Husband and the Wife dye, the eldest Son dies, the youngest Son enters, and Surrenders to the use of a stranger: And the sole question upon which they rebel, if the Wife was Tenant in tayl, or if she had fee simple conditional; and it was argued by *Nicholls*, that the Wife was Tenant in tayl, and to prove that, he cited 2 cases in *Littleton*, where it is expressly mentioned, who may be Tenant in tayl; see Sect. 73. 79. And who may have a *Formedon*, see in the descender, Sect. 76. And he grounded that upon reason; for that, that it cannot be denied: But that fee simple might be of copy-hold according to the custome, and as well as fee simple, as well it may be an estate tayl, for every greater contains his lesse, and he said that this is grounded upon the reason of other cases, as if the King grant to one, to hold Plea in his Court of all actions of debt, and other actions, and then one action of debt is given in case where it lieth not at the common Law, yet the Grantee may hold Plea of that: But if a new action be framed, which was not in experience at the time of the grant, but is given after by Statute, the grant shall not extend to that; and to the Objection, that copy-hold is no Tenement within the Statute, of gifts, &c. As to that he saith, that that shall be very well intended to be within the Statute as it is used, and 4. H. 7. 10. Anno makes a gift in tayl by deed, the Donee hath an estate tayl in the deed as well as in the Land; so *Morgan* and *Maxells* case, Commentaries 26. And so of Office, Honour, Dignity, and copy-hold also; and *Dyer* 2 and 3. *Phil*: And *Mary* 114. 61. It is found by speciall verdict, that copy-hold Lands have been devisable by copy in tayl, and so it is pleaded 2 and 3 *Eliz*. *Dyer* 292. b. And when a lesser estate is extracted out of a greater, that shall be directed and ordered, according to the course of the Common Law; and for that the Wife shall have plaint in nature of a *Cui in vita*, and 25. H 8. b. Title *Tenement* by copy of Court Roll, it was said for Law that tayl may be of a copy-hold, and that *Formedon* may well ly of that in descender, by protestation to sue in nature of a *Formedon* in descender at the Common Law, and good by all the Justices;

Justices; for though that *Formedon* in descender was not given but by Statute: Yet now this Writ lieth at the Common Law, and shall be intended that this hath been a custome, time out of mind, &c. And the Demandant shall recover by advise of all the Justices, and the like matter in *Essex M. 28. H. 8.* And *Fitz.* affirms; that in the chamber of the Dutchy of *Lancaster* afterwards; and also he saith, that when custome hath created such Inheritances, and that the Land shall be descendable, then the Law shall direct the descent, according to the Maximes and Rules of the Common Law, as incident to every estate descendable, and for that shall be *possessio Fratri*, of a copy hold estate, *4. Coks 23. a. Browne's Case 6.* And there *28. a. Gravener and Todd*, the custome of the Mannor of *Allesley* in the County of *Warwick* was; that copy hold lands might be granted to any one in fee simple: and it was adjudged that a grant to one and the Heires of his Body, is within the Custome, for be that Estate Tayl, or Fee simple conditionall, that is within the Custome: So he may grant for life or for yeares by the same Custome, for Estate in Fee simple includes all, and it is a *Maxime* in Law, to him that may do the greater, it cannot be but the lesse is lawfull; and over he said, that in all cases where a man was put to his reall action at the Common Law, in all these cases a copy holder may have plaint with protestation to prosecute in nature of the same action; and to the objection, that there cannot be an Estate tayl of copy hold Land, for that, that the Tenant in tayl shall hold of him in reversion, and shall not be Tenant to the Lord, to that he said that this Estate may be created as well by (*Cepit extra manus Domini*), as by Surrender, and then there is not any reversion or remainder, but it is as if Rent be newly granted in tayl; but he said there may be a reversion upon an Estate tayl, as well as upon an Estate for life, and he did not insist upon the Custome, but upon this ground, that if the Custome warrant the greater Estate, which is the Fee simple, the lesse shall be included in that. And he did not argue, but intended that it would be admitted, that descent of copy hold Land shall not take away entry nor Surrender of that, nor shall make discontinuance; so prayed Judgement and returne. *Harris* the youngest Serjeant argued for the Plaintiff, that it shall be a Fee simple conditionall, and not an Estate tayl, and he said, that the sole question was if the Statute of *Westminster 2.* converted and changed Fee simple conditionall of copy hold into an Estate tayl, for if it be not an Estate tayl within this Statute, it shall not be an Estate tayl at all, for *Littleton* saith, before the making of the said Statute, these Estates were Fee simple conditionall, and for that cannot be by prescription; also he said that copy hold Estate

was so base an Estate, that at the Common Law a copy holder had no remedy but only in the Court of the Lord: But as to *Lisle-ton* who sayth, that he may have a *Formedon* in descender, to this he saith, that the Heire which hath Fee simple conditionall may have it by the Common Law, for this was at the Common Law before the making of that Statute of *Westminster 2.* As it appears by 4. *Ed. 2. Formedon* 50. 10. *Ed. 2. Formedon* 55. And by *Bendlowes* in the Lord *Barkleys* case, in the Commentaries 239. b. by *Benlofe* where it is said by him, that a *Formedon* in descender was not at the Common Law, but in a speciall case; where an Assise of *Mortdaucester* would not serve the Issue; that is, if a man had Issue a Son, and his Wife died, and after that he takes another Wife, and Land was given to him and to his second Wife, and to the Heires of their two Bodies begotten, and they have another Son, and the Wife dies, and after the Father dies, and a stranger abates, there he sayth that before the Statute, the youngest Son could not have an Assise of *Mortdaucester*, and for that he shall have a *Formedon* in descender, which was no other but a writ founded upon his Case, see 10 of *Ed. 2. Formedon* 55. And for that when *Lisleton* speaks of an Estate tayl of copy-hold, that ought to be understood of Fee taile, which may be Fee simple conditionall, and so *Lisleton* may be reconciled, and will well agree with himself; also it seems that Copy-hold is out of the intent and meaning of the Statute of *Westminster 2.* For at the common Law in ancient times, this was base Estate, and not more in reputation then villinage, and also if such an Estate then might be created of that which shall be perpetual and no means to barr it, for surrender of that doth not make any discontinuance, and Recovery was not known, till 12. *Ed. 4.* and he saith, that in ancient time the name of Copy-holder was not well known, for in ancient time they were called Tenants in Villinage, and Tenants by copy is but a new terme, see *Fitzherberts Natura Brevium* 12. b. and the old Tenures fol. 2. and *Bracton lib. 2. charter* 8. In gifts made to servants calleth them Villaines and Sokemen, and in the old Tenures it is said that the Lords may expell them, and upon this he inferred, that if it be so base a Teoure, though it be of Lands and Tenements, yet they shall not be intended to be within the intent of the makers of the Statute of *Westminster 2.* and also by a second reason, that is, that it was not the intent of the makers of the Statute that this should extend to any Lands but only to those which are free Lands, for the parties are called Donees and Feoffees, and the will of the Giver should be observed according to the forme in the Charter of his gift manifestly expressed, by which it appears that it ought to be of such Land of which a gift may be made, and also the Statute provides.



provides that if the Donee levy a fine (that in right it should be nothing) by which also it appears as to him it seemed, that it ought to be of such Land, of which a fine may be levied. And also for a third reason, which was the great Inconvenience, which would ensue upon it, for then the Donees have no meanes to dispose of that, nor give that for the advancement of his Wife nor her Issues, and also the Lord shall loose his signiory, for the Donee shall hold of him in Reversion and not of the Lord, and it is resolved in *Hyden's Case*, 3 *Coke* 8. a. That when an act of Parliament alters the service, Tenure, Interest of the Land, or other thing in prejudice of the Lord or of the custome of the Mannor, or in prejudice of the *Tenants*, there the generall words of such act shall not extend to Copy-holders, see the opinion of *Maurwood* cheife Baron there, and he agreed, that admitting it shall be an Estate taile, that then Surrender shall not make discontinuance, and so he concluded and prayed Judgment for the Plaintiffe his Clyent, see *Hill* and *Upchurs Case*, which was adjudged in the Kings Bench, and the principall case was adjourned until the first *Saturday* of the next Terme. See *Hillari* 7. *Jacobi* in this Book in *Replevin*, the Plaintiff was non-suited between the same parties. See also *Pasche* 9. *Jacobi* 149.

*Hillari* 1610. 8. *Jacobi* in the *Common Bench*.

*Wallop* against the *Bishop of Exeter* and *Murray Clark*.

IN a *Quare impedit*, the case was, Doctor *Playford* being Chaplain of the King, accepted a Benefice of presentation of a common person, and after he accepted another of presentation of the King, without any dispensation, both being above the value of eight pound *per annum*, if the first Benefice was void by the Statute of 21 *H. 8.* chapter 13. or not, was the question, for if that were void by the acceptance of the second Benefice without dispensation, then this remains a long time void, so that the King was intituled to present by Laps, and presented the Plaintiff, the Statute of 21 *H. 8.* provides, that he which is Chaplain to an Earle, Bishop, &c. may purchase license or dispensation to receive, have, and keep, two Benefices with cure, provided that it shall be lawfull to the Kings Chaplaines to whom it shall please the King to give any benefices or promotions spirituall, to what number soever it be, to accept and receive the same without incurring the danger, penalty, and forfeiture, in this Statute comprised, upon which the question was, if by this last Proviso, Chaplaine of the King having a Benefice with cure above the value of eight pound *per annum*, of the presentation of a common person, might accept another Benefice with cure over the value of eight.

eight pound also of the presentation of the King without dispensation, the words of the Statute, by which the first Church is made void are; and be it enacted that if any parson or parsons having one Benefice with cure of Soules, being of the yearly value of eight pound or above, accept and take any other with cure of Soules, and be instituted and indued in possession of the same, that then and immediately after such possession had thereof, the first Benefice shall be adjudged in the law to be void: See *Hollands case* 4. *Cooke* 75. in this case was not argued but the point only opened by *Dodridge* Serjeant of the King for the Plaintiff, and day given for the argument of this till the next term.

Hillary 8. Jacobi 1610. in the Common Bench.

Trespass against Lamb.

**L**ewes *Trespass* was Plaintiff in waste against *John Lamb*, the Plaintiff supposed the Defendant had made waste in sowing and plowing ancient meadow, the which he had let to the Defendant for years in *Rushton* in the county of *Northampton*, and sowed it with Woade, and prayed Estrepement upon the Statute of *Gloucester*, chapter 13. And upon examination it appears, that the Lands let was pasture and Meadow, the Pasture was Ridge and furrow, but had been mowed and used for meadow for diverse years, and that the Defendant plowed and sowed that with Woade, but this which had been ancient meadow, he used that as Meadow, and did not convert that to Arable Land, but the Judges would not grant any Estrepement to the Pasture, for that it was Ridge and furrow, and it was no ancient meadow, although that had been mowed time out of minde, &c. But to the ancient Meadow they granted a writ of Estrepement, but *Foster* seemed to be of another opinion, for that, that it was to sow Woade, for that that it is against common Right, and the fume and smell of that is offensive and infectious, but if it had been to sow Corne he agreed as above, and for securing the Writ of Estrepement, they all agreed that the Sheriff ought to take, if need be, the power of the County against those which made the waste (hanging the Action) and may commit them if they will not obey him, for the words of the Statute are, that you shall cause to keep, which shall be intended in safety. But if Lessee for years trench or draine, that is no Waste, as it was now of late times adjudged, where if the Lessee takes any of the reasonable Bootes that the Law allowes, that it shall be no Waste nor Estrepement.

ment shall be granted, see *Fitcherberts Natura Brevium*, 59. m.

If a man devise Land to his Executors for years, this is affects; but if he devise that his Executors shall sell his Lands, or devise his Lands to his Executors to be sold, this shall be no affects untill the Lands are sold, and the money for which the land shall be sold, shall be affects.

A Record of *Nisi prius*, in an Action of Debt upon an obligation, with condition to pay such a sum of Money at such a Feast next after the date of the obligation, and the day of the date of the obligation was omitted in the Record of the *Nisi prius*, so that it doth not appear which shall be the next Feast at which the money ought to be paid after the date, and by all the Justices, that was no perfect Issue, and for that the Justices of *Nisi prius* have no power to proceed upon it, and for that it shall not be amended, otherwise if it had been a good Issue, though that another thing had been mistaken, see *Dyer 9. Elix.* 260. 24. And see before the same Term here.

The King pardoned a man attaind, for giving a false verdict, yet he shall not be at another time impannelled upon any Jury, for though that the punishment were pardoned yet the Guilt remaines.

Hilary 8. Jacobi 1610. In the Common Bench.

James versus Read.

THE case was, the King was seised of a Mannor, where there were diverse Copy-holders for life, and was also seised of eight Acres of Land in another Mannor, in which the Copy-holders have used time out of minde, &c. To have common, and after the King grants the Mannor to one, and the eight Acres to another, and a Copy-holder puts in his beasts into the eight Acres of Land, and in trespass brought against him by the Patentee of the eight Acres, he prescribes that the Lord of a Mannor, and all those whose estate he hath in the Mannor have used time out of minde, &c. For themselves and their Copy-holders to have Common in the said eight Acres of Land; and further pleaded that he was Copy-holder for his life by grant, after the said unity of possession in the King, and so demanded judgment if action, against which the said unity of possession was pleaded, upon which the Defendant demurs, and all the Justices seemed that though the prescription was pleaded that the common was extinct, but it seems also to them that by special



ciall pleading he might have been helped and save his common, for this was common Appendant, see 4. Coke, *Tirringham's Case*, 37. 6.

Hilary 8. Jacobi 1610. In the Common Bench.

*Cartwright against Gilbert.*

**I**N Debt upon an obligation with condition to be and perform an Arbitrement to be made, the Arbitrators award, that the Defendant should make Submission, and should acknowledge himself sorry for all transgressions and words, at or before the next Court to be held in the Mannor of P. And for the not performance of that Award, the Plaintiff brought this Suit, and the Defendant in Bar of this pleads that at the said next Court, he went to the Court to make his submission and to acknowledge himself greived according to the Award, and was there ready to have performed it, but further he saith, that the Plaintiff was not there to accept it, upon which the Plaintiff demurred; and it seemes to *Coke and Foster* that the Defendant hath done as much as was to be done of his part; and for that, that the Plaintiff was not there ready to accept, the Defendant was discharged, for this submission is personal, and to the intent to make them freinds, and for that both the parties ought to be present. But *Walmesley and Warburton* seemed, that it might have been very well made in the absence of the Plaintiff, as well as a man may submit himself to an Arbitrement of a man which is absent, for this is only to be made to the intent to shew himself sorrowfull for the Trespasses and words, which he hath made and spoken, and it was not argued but adjourned till the next terme, and the Justices moved the parties to make an end of that, for that it was a trifling Suit.

Hilary 8. Jacobi 1610 In the Common Bench.

*Sir Edward Asseild.*

**S**IR Edward Asseild was bound in an obligation by the name of Sir Edmund, and subscribed that with the name of Edward, and in Debt brought upon that, he pleads (it is not his Deed) and it seemes to all the Justices that he might well plead that, for it appears to them that he is not named Edmund, and the original against him, was, Command Edward, otherwise Edmund, and this was not good, for a man cannot have two Christian names, and if judgment were given against him by the name of Edmund, and the Sheriff arrest him by

by *Capias*, that false imprisonment lies against him: But if he have a man given to him, when he was threatened, and another when he was confirmed, he shall be called and known by the name given unto him at the time of his confirmation, and not by the first; see 11. *R. 2. Grants* 9. Ed. 3. 4. 12. *R. 2. Proffers* 38. See *Perkins fol.* 81. b. p. 1. *Grants*, 16. *Eliz. Dyer*, 279. 4.

*Hillary & Jacobi* 1610. In the Common Bench.

*Stylar against Baxter*, 1610. add. within shodw ni

*Stylar* brought an Action upon the case against *Baxter* for calling him perjured man, the Defendant justified that he was perjured in such a Court, in such a deposition, and so pleaded that finally, and it was found for the Defendant at the *Nisi* trial, and Judgment was given accordingly; and the Defendant afterwards published the same words of the Plaintiff, upon which he brought a new Action for the new publication, in which the Defendant pleaded in Bar the first Judgment, upon which the Plaintiff demurred, and it was adjudged without any Contradiction, that it was a good Bar.

*Hillary & Jacobi* 1610. In the Common Bench.

*Andrew against Ledlam* in the Star Chamber.

*Andrew* exhibited his bill in the Star Chamber against *Ledlam*, the matter, *Andrew* being a rich Usurer, delivered to *Ledlam* being a Scrivener, one thousand pound to be employed for him for interest, that is, for ten pound for the use of every hundred pound for every year, *Ledlam* being a Prodigall man, as it seemed, spent the Money, and delivered to *Andrew* diverse severall obligations, every of them containing three severall persons, well known to be sufficient, being some of them Knights, others Gentlemen and Esquires of great Estates, and the other good Citizens without exceptions, were bound to *Andrew* in two hundred pound for the payment of one hundred sixty pound to *Andrew* at a day which come within six Moneths then next coming, as *Andrew* had used before to lend his Money, and delivered the Obligations with Seales unto them, and the names of the parties mentioned to be bound by that subscribed, and his own name also subscribed as witnessing the sealing and delivery of them, as a publique Notary, as the good and lawfull obligations of the Parties which were mentioned in them, where indeed the parties mentioned in them, had

not any notice of any of them. The Lord said he had forged and counter-  
feited them, as he hath confessed upon his Examination, and  
Interrogatories administered by the Plaintiffs this Court, and at  
the hearing of the Cause and sentence of that, it was intended  
if *Andrew* shall loose both his Eares or but one, for if it be but  
one forgery, then by the Statute of *13 Eliz.* Admitting that the  
Bill is grounded upon this Statute, he shall loose an Ear and  
pay the double damages and costs to the party greived: And  
also if *Andrew*, being but the Obligee, and not any of the parties,  
in whose names the Obligations were forged, if he be such a party  
greived, which shall have double costs and damages, and the  
double were referred by *Chief Justice* of the Common  
Bench, where they were forged, and *Chief Justice* of the  
King's Bench, shall loose but one ear, for if it be but one  
forgery, for that he was made an officer within the Statute,  
but *Chief Justice* said that the Bill was general, that is, against the Law  
and Statutes of this Realm, and not precisely upon the Statute  
of *13 Eliz.* For he said, that when a Bill is founded upon an Act  
of Parliament, that the weight is to be made in the branches which  
are mentioned in the Act, the which wants in this Bill, but in  
somuch, that it was adjudged in Parliament what punishment  
such offenders shall have, they inflicted the same punishment  
which is appointed by the Statute, and added to that, that he  
should be imprisoned till he found good Sureties for his good behav-  
our, and also that he shall be brought to every one of the  
King's Council, with great Papers in his hand, contain-  
ing his offence in Capital letters, but the Lord Chancellor re-  
pounded the double damages in such manner, that is, thereby  
shall not be intended double interest, but only the Principal  
Debt.

Motto, that if Execution be directed to a Sheriff, to Arrest  
man, or to make Execution within a Liberty: And the Sheriff  
disobey his Warrant to a Bailiff of the Liberty, for to make Exe-  
cution of the Process: which makes it, and later is a Breach,  
and not able to answer for that, the Lord of the Franchise shall  
answer for that, and shall be liable to answer for his Bayliff, by  
a Jure Infante, as a quinnus ezen neds dionhold in a law case

## Burdett against Pix

IN Debt upon a Single Bill by *Burdett* against *John Pix*, as  
 Enfranchiser of *Albany*; the case was this; that is, *Freemason* was  
 bound in an Obligation of thirty four pound to *Burdett* the Plain-  
 tiff.



and was also bound to one William Pix in 80. l. *Præsum* dyed intestate, and the Letters of Administration of his Goods were Committed after his Death, to the said John Pix, the Defendant and the said William Pix also made the said John Pix the Defendant his Executor and died, and the Defendant in this Action pleads, that the said *Præsum* was indebted to the said William Pix, and that he was his Executor, and that he had Goods of the said *Præsum*, sufficient to satisfy the said debt, the which he retained for the satisfaction of that, and that over that, he hath not of him to satisfy him, upon which the Plaintiff Demurred, for that, that the Defendant doth not plead, that he hath made his election to retain the said goods, for the satisfaction of his own said Debt before the Action brought, and by all the Justices, he ought to make his election before the bringing of the Action, otherwise he shall be charged with the other Debt. See *Woodward and Darys Case*, Commentaries 184. a. and 4. *Co. 30. Conlivers Case*.

Hilary 8. Jacobi 1670. in the Common Bench.

Bone against Stretton.

The case was this, A man seised of two Acres of Land, makes a Lease for years of one Acre to one, and another Lease for years of the other Acre to another, and then he enters and makes a Feoffment, and severall Liveryes upon the severall Acres, and one of the Lessees being present, doth not assent to the said Livery, and the use of the said Feoffment, was not the use of his last Will, and then he declares his last Will, and by that recites the said Feoffment, and then declares the use of that to be to the use of himself for life, the remainder over to a stranger, and after the Tenant for years which did not assent to the Livery, grants his Estate to the Feoffor, and the Feoffor dies, and *Nicholls* Serjeant moved first: That this enures as a grant of a reversion, and that the grant of the particuler Tenant enures, first as an Attornment, and then as a surrender of his Estate, as if it had been an expresse surrender, and all the Justices agreed, that this doth not enure to make Attornment and surrender as expresse surrender will, for an expresse surrender admits the reversion to be in the Grantee to whom the surrender is made: But in this case before Attornment the Grantee hath nothing, and after Attornment the particuler Estate being granted, it shall be drownd in the reversion, *Harris* Serjeant, the words of the devise are, that his Feoffees and all other

Persons which after his Death shall be seised, shall be seised to the same uses before declared and of one Acre he hath not any Feoffment, for of that the Feoffment was voyd, and yet it was agreed that the devise was good as *Lyngell Case* was in 25. H. 8. cited by *Anderton* in *Welden* and *Elkingtons Case* Commentaries 323 b. And he argued that though that when a conveyance may enure in severall courtes, yet it cannot enure for part in one course, and part in another course, and for that this devise enures as a devise of Land for one Acre, and declaration of the use of the Feoffment for another Acre, for it is agreed in *Sir Rowland Haywards Case* 2. *Case* 35. a. 6. *Coke* 18. a. *Sir Edward Clesses Case*, and also in this case the devilor hath made expresse declaration, that the Land shall passe by the Feoffment, and that the Will shall be but a declaration of the use of the Feoffment, and for that nothing shall passe by the devise, with which the Justices seemed to accord, and cited a case to be adjudged in the Kings Bench, 40. *Eliz.* where the Father gives and grants Lands to his Son & his heires with warranty, and makes a Letter of Attorney within the deed to make Livery, and adjudged, that that shall not enure as a Covenant to raise a use, for that, that it appears by the Letter of Attorney, that his intent was, that that should enure as a Feoffment, and not as any other manner of conveyance, see 14. *Eliz. Dyr* 311. 83. *Master Cromwells Case*, and so it was adjudged accordingly.

*Hilary 8. Jacobi 1610. in the Common Bench:*

*Gargrave against Gargrave.*

*Replevin.*

**K**atherine Gargrave, was Plaintiff in a *Replevin* against Sir Richard Gargrave Knight, and the case was this; The Father of Sir Richard Gargrave was seised of divers Tenements called *Lyngell Hall* in *Lyngell Hall*, and of a Moore called *Kingsley Moore* in another Town, and the Tenants of the said Father of Sir Richard, have used to have Common in the said Moore, and the said Father so being of that seised, demised the said Tenements to the said Katherine Gargrave for her Joynture, by these words, by the name of *Hingell Hall*, and certaine Land, Meadow, and Pasture in certaintie; and with all Lands, Tenements, and Hereditaments to that belonging; or with that occupied and enjoyed, now or late in the Tenure of one *Nevill*; and *Nevill* was Tenant of the said premises, and had Common in *Kingsley Moore*, upon which the question was; if the said Katherine by this demise shall have Common

Common in the said Moore or not. And *Hutton* Serjeant argued, that the said *Katherine* shall have Common in the said Moore, for he said, that the said demise shall be expounded, according to the intent of the parties, as it is agreed in *Hill* and *Granges* Case, Commentaries 270. b. Where a man makes a Lease for yeares of a house, and all the Lands to that belonging, and though it is there agreed, that Land cannot be appurtenant to a house, yet this word appurtenant, shall be taken in the effect and sense of usually occupied with the Messuage or lying to the house, by which it appears that the words are transferred from the proper signification to another, to satisfy the intent of the parties, for it is the office of the Judges, to take and expound the words which the common People use, to expresse their intent according to their intent, and for that shall be taken not according to the very definition, inasmuch that it doth not stand with the matter, but in such manner as the party used them: And for that this grant shall amount to a new grant of Common in the said Moor, for as it seems common or feeding for Cattell may be granted, and passe by the name of Tenements & Hereditaments, or at least shall be included and comprised within the words Tenements and Hereditaments, and so shall be construed as a thing occupied and enjoyed with the said Messuages, see *Hen. Finches* Case 39. Cok. And it was an expresse endowment upon the demise, that the said *Katherine* should not have Common in the said Moore, but it was agreed by all, that this was vaine and idle, and nothing worth; but he urged that this shall have a favorable construction, for that it was for Joyature, which shall have as favorable construction as Dower. And so he prayed Judgement for the Plaintiff; and of the other part *Nicholls* Serjeant argued, that this shall not amount to a new grant, for he said that they are not apt words to receive such construction, for he said that this is no Tenement or Hereditament, no Common, but only a Feeding for the Cattell of the Lessee, in the wast of the Lessor, see 20. *Edw. 2. Fitzhugh*, admeasurement, and it cannot passe as a thing used with the said house, for that was not in Esse at the time of the grant, and there is not any apt word to make a new grant. And he cited a Judgement in Action of wast, between *Arden* and *Darcy*, where *Arden* was seised of the Mannor of *Curball* and also of *Parkhall*, and makes a conveyance of the Mannor of *Curball* to divers uses, and at this time parcell of the Mannor of *Curball* was occupied with *Parkhall* as parcell of thar, and after made another conveyance of all his Lands in England, except the Mannor of *Curball*: And adjudged that the Parke which is used with *Parkhall* shall not be within the exception; *Coke* saith, that it was only feeding, and not Hereditament, for the



the Inheritance of both was in the Lessor; but if it be granted feeding it shall be intended the same like feeding, that the Tenant hath; as if the King grant such Liberties as the City of London had, and that shall be good, and so it was adjourned.

Hilary 8. Jacobi, 1610. In the Common Bench.

Cannige against Doctor Newman.

**I**N an Information upon the Statute of 21 H. 8. chapter 13. Of non-residency, it was found by speciall Verdict, that Doctor Newman was Incumbent, invested in the Rectory of Staplehurst in the County of Kent, and that hee was also seised of a house in Staplehurst aforesaid; situate within twenty yards of the said Rectory, and that the mansion house of the said Rectory was in good repaire, and that Doctor Newman held that in his hands and occupation with his one proper goods, and did not let it to any other, and that he inhabited in the said Messuage and was in the Parsonage, the Statute of 21 H. 8. chapter 13. Provides, that every Parson promoted to any Parsonage, shall be personally resident, and abiding in, at, and upon his said Benefice, and in case any such spirituall Parson keep not residence at his Benefice, as aforesaid, but absent himself willfully by the space of a month together or two Moneths, to be accounted at severall times, in any one year, and makes his residence and abiding in any other places by such time, that then he shall forfeit for every such default ten pounds, the one halfe to the King, and the other halfe to the Informer; and if the said Doctor Newman was not resident, and incurred the penalty of this Statute was the question, and it was argued by Haughton, that he had incurred the penalty of the Statute, and was non-resident within the intent, and he argued that to some intent all the Parishes may be said the Benefice of the Parson, for that, that he hath benefice out of it, and he is called Parson of such a Town or Parish, but this is not the Benefice that the Statute intends, upon which he ought to be resident, as in the 29. Assise 55. If a Corrody be granted out of an Abby, it shall not be intended out of the feare of the Abby, out of the Booke of 29. Assise 8. Where it is said, that if a Rent be granted out of a Priory, that all the possessions of the Priory are charged, as to that he saith, it was but (it was said) and not Judgment, and also the said Bookes may be well reconciled for it is more proper that the feare of the Abby shall be charged with the Corrody, and the possessions of the Priory with the Rent, and also he said, there were seven causes of making of the said Statute, whereof but two are to our purpose, the first is Hospitality, second

relief

eleise of the Poore, and these are to be done in the Parsonage house, for this is the free Almes of the Church, and so it was adjudged, 34 of *Eliz.* in the Kings Bench, *Brown and Hudson*, and in this Court also, and in this Court also in the 40 of *Eliz.* in the Kings Bench betwixt *Burter and Goodhall* 8 *Coke* 21 b. that he ought to be resident upon the Parsonage house and not other where, and he allowed and agreed, that imprisonment without deceit, and excuses are good excuses, but so it shall not be a prejudice, for the parsonage house is in good repair: And so concluded that judgment shall be given for the Plaintiff: And for the Defendant, *Barker* arguant argued, that it appears by the special Verdict, that Doctor *Williams* held the Parsonage house in his own hands and occupation, and did not let it, upon which he gathered that his servants were resident upon it, and to the exposition of the Statute, he saith, that it appears by *Haydon's Case*, 3 *Coke* 7. a. That the better means to extend Statutes, is to consider the mischief which was at the common Law before the making of that, and when it is intended to be reformed by that, and this appears by the Preamble of that Statute, so he saith, that before the Council of *Liverpool* a man might pay his tithes to whom he would, but by the same Council all the Parishes made the Benefice of the Parson, for he receives benefit by that, and yet he said, that before the said Statute, every spiritual man was bound and compellable by the Ecclesiastical Law to be resident, yet if he were in the Kings Service or an Officer in the Chancery, he should be excused, as it appears in the Register, fol. 58. b. Though that he were Dean, the which Office meerey requires his personall residence, as it is there said, and also he saith, that the Case between *Burter and Goodhall*, was that the Parson demised all the Parsonage house but only one Chamber, and was not resident in that, but in a copyhold within the Town, and so prayed Judgment for the Defendant, this case was compounded by the Lord *Coke*, but he intended this was no residence within the Statute, for this was not his Benefice, but the Tenants part of that, as he said hath been adjudged in the Exchequer.

Millary 8. Jacobi 1610 *In Banco Communi.*

*Crozat against Morris*

This Case was, A Commoner brought an Action upon the Case, against a stranger, for that his Beasts came in and fed upon the Common, and by *Coke*, *Whitney*, and *Warburton* it lieth very well, *Foster* to the contrary, for then every Commoner may have the same Action, and then it would be infinite.

*Pjat.*

Hillary 8. Jacobi 1610. In Banco Communis.

Plea against the Lady Saint John, Postea, 269.

SE E for the beginning of this in *Michalemas* tearme last, and the Scale was argued again by *Hutton* Serjeant for the Defendant, that the parcelling of reversion destroyed the Covenant, it was agreed in *Winters* case in case of condition and he agreed, that that Covenant is within the Statute of 31. H. 8. chapter. 34. as well as condition, and for that Grantee of part of the Reversion shall not have an Action of Covenant, for then if there be twenty Grantees, every one of them shall have severall Action, and this was not the intent of the Statute, and as to the Common Law before the Statute, a thing which gives action cannot be divided, and he urged, that when the Reversion of Fee simple was first granted, if he may by that have an action, then when the Reversion of the tearm was granted, he may have another action, and so a man may have two severall actions for one thing, see, 29. Affise 23. Three Coparceners were, and Rent of five pound was allotted to two of them equally to be divided, that is, fifty shillings to one and fifty shillings to another, and they two joyned in an Action, and it is doubted if the Writ shall abate or not, and 44. Ed. 3. 34. b. The Abbot of *Westminsters* Case, the Abbot made a Lease of a Mannor, except the Wood, and after by another Deed he let the Wood, and the Lessee made Wast in the Mannor and the Wood, and he brought one Action of Wast and it is not good, and he agreed that one *Formedon* yeth upon two discontinuances, for there was but one discontinuance, and that is the cause of the Action, but a man cannot have a Writ of *Warrantia Charta* upon two Deeds, no more in the principall case, for the Plaintiff hath his Title by two Deeds, and so concluded, and prayed Judgment for the Defendant. *Harris* Serjeant argued of the other part for the Plaintiff, that an action of Covenant lieth very well, for the originall Lease was but one intire Lease, and the Covenant was also intire, and for that the Grantee of the Reversion shall have advantage of that, and he agreed that in real actions, which alwaies are grounded upon the title, and for that if it be grounded upon two titles, he ought to have 2. actions according to his title, but in personall actions where the action is grounded upon the deed, & another matter which comes (*Ex post facto*) which is the (wrong) which is the cause of the action, & for which damages shall be recovered, as it is said in *Blakes* Case, 44. 2. 6. *Coke*, and this is the reason, that a man may have an Action upon the Statute of Offenders in Parkes for hunting in two Parkes, 13. H. 7. 12. and 8. Ed. 4. 5. One Action of Trespasse for Trespasses made at severall times, and



for one Action of Debt for diverse Contracts: 11 H. 6. 24. by *Martin*, 3 H. 6. *Tresspass*, 3 H. 4. But he argued that in reall or mixt Actions, as ravishment of Ward, for severall Wards or one; *Quare impedit* for severall Churches, this shall not be good, *Fitz. Ward* 52. 3. H. 6. 52. And also he said that the Statute of 32 H. 8. chapter 34. by expresse words gives the same remedy to Grantees of Reversions, that the Grantors themselves had, and the Grantor without question, may have an Action if he have not granted the Reversion, and so he concluded, and prayed Judgment for the Plaintiff, and it was adjourned.

Hillary 8. Jacobi 1610. In the Common Bench.

*Sturgis against Dean*, see T. 65.

A Man was bound to pay to the Plaintiff ten pound within ten dayes after his return from *Jerusalem*, the Plaintiff proving that he had been there, and the Plaintiff after ten dayes brought his Action upon the Obligation, without making of any prooffe that he had been there, and if that were good, or that he ought to make prooffe of that before he brings his Action, this was the question, and also he ought to make prooffe, then what manner of prooffe, and it was moved by *Haughton*, that when a thing is true, and is not referred to any certain and particular manner of prooffe, as before what shall be done, or how the prooffe shall be made, the party may bring his Action, and the other party may take his Issue, upon the doing of the thing which ought to be proved & the triall of that shall be prooffe sufficient, and in his count he need not to aver that he had been there, see 10 Ed. 4. 11. b. c. 15. Ed. 4. 25. 7 R. 2. *Barr* 241. And here also the prooffe, if any should, it ought to be made within ten dayes, the which cannot be made by Jury in so short a time, as it is said by *Choke* in 10 Ed. 4. 11. b. though that he agreed, that when a man may speake of prooffe generally, that shall be intended prooffe by Jury, for that, that this is the most high prooffe, as it is said in *Gregories Case*, 6 Coke 20. a. and 10 Ed. 4. 11. b. But of the other part it was said by *Sherley Serjeant*, that true it is that prooffe ought to be made for the Defendant, as the Case is in 10 Ed. 4. 11. That then such prooffe should be sufficient, for the Plaintiff may bring his Action before that the Defendant may by possibility bring his Action, but where the Plaintiff ought to make the prooffe, there he ought to prove, that before that he bring his Action, and it shall be accounted his Folly, that he would bring his action before he had proved that, but all the Justices agreed, that the Plaintiff need not to make any other prooffe,

proofe, but only by the bringing of his Action, but the Lord Coke took exception to the pleading, for that, that the Plaintiff had not averred in his replication that he was at Hierusalem, but generally that such a day he returned from thence; and he said, that a man might returne from a place, when he was not at the same place, as if he had been neere the place, or in the skirts of Hierusalem, and upon that it was adjourned; see the beginning of the Trinity 8. Jacobi 462. a. Mich. 23. 200. and 204.

Hillary 8. Jacobi 1610. in the Common Bench.

### Wickenden against Thomas.

2. Executors  
one refuses.

**T**HE Case was this, 2. Executors were joyntly made in a Will, one of them releases a Debt due to the Testator, and after before the Ordinary refuses to Administer, and it was agreed by all the Justices, that the release was Administration, and for that he hath made his Election, and then the Refusall comes too late, and so is void.

### Bedell against Bedell.

Waste. 2. Ex-  
ecutors, one re-  
fuses.

**I**N waste the case was this, A Man seised of Lands makes his Will, and of that makes two Executors, and devises his Lands to his Executors for one and twenty yeares after his Death, upon trust, that they should permit A. To enjoy that during, and to take all the profits all the Terme, if he so long lived, and if he died within the Terme, then that B. should take the profits, and so with others remained in the same manner, with the remainder over to a stranger in sayl, one of the Executors refuseth to prove the Will, or Administer, and also to accept the Terme, the other executor proves the Will, & Administers the Goods, and enters into the Land according to the Lease, and that assigns to A. according to the trust reposed in him, and after that he in reversion in sayl brings an Action of waste against the Executors which proved the Will, and he proved all the matter aforesaid, and that before the assignement, and that before that no waste was made, and it seemes to all the Judges, that this was a good Plea, for the waving of one Executor is good, and though that he might after Administer, as the book of 2. Ed. 4. is for that, the Interest of his Companion preserves his Authority, where are 2. or more. But if there be but one Executor and he refuseth, and the Ordinary grants Administration to another, he cannot then Administer againe, and Coke cheife Justice cited that one *Randles*, made the Lord

Chancellor

Chancellor which then was the cheife Justice of England, and the Master of the Rolls, his Executors and died, and they with their Letters to the Ordinary, witnessing that they were employed in great businesses, and could not intend the performance of the said Will, and that for that, they desire to be free of that, and that the Ordinary would commit the Administration, of the goods of the said Testator to the next of blood, and this sufficient refusal. And upon that the Ordinary committed the Administration accordingly. And to the pleading, that no will was made before the assignement, they all agreed that this was good, and so it was adjourned for this time.

A man sold his Land upon a condition, and after took a Wife and died, the Heire entred for the Condition broken, yet the Wife shall not be endowed, so if the Condition had been broken before the Death of the Husband, if he had not entred, for he had but title of entery.

Bargaine and  
Sale upon  
Condition.

Hilary 8. Jacobi 1610. in the Common Bench.

As yet Doctor Hussey's Case.

**M**oore against Doctor Hussey and his Wife and many others, in Ravishment of Ward. The case was, the Ward of Moore was placed at the University of Oxford to be instructed in the liberal Sciences, and was married by the Wife of Doctor Hussey to the Daughter of the said Wife, which she had by a former Husband. And for that Moore brought this Writ against Doctor Hussey and his Wife, and the Minister which married them, and all others which were present at the said marriage, or Actors in that. And upon Evidence it appeared, that Doctor Hussey was not present nor Actor in it, and for that the Jury found him not guilty, but they found all the other Defendants guilty of the said Ravishment, for upon the Evidence it appears, that the Wife of Doctor Hussey procured and provided the Minister which married them, and in the last Michaelmas Terme this was tried here at the Bar, and the Jury assessed Damages to ten pound, and the value of the Ward to eighty pound, for so much Moore proved that he could have sold him for, and also the Jury found, that the Ward doth appeare married being of the Age of 16. yeares at the time of his marriage, and exceptions were taken to that, for that it was not found of what age the Ward was at the time of the verdict, and it was urged by Dodridge that by the Statute of Westminster 2. chap. 39. The precise age ought to be found at the time of the verdict. Secondly it was found that the Ward did appeare married;

Ravishment of  
ward.



and doth not say without License of the Guardian, and the Guardian may give his consent, where the Ward marries himselfe, and then there is no cause of action. The third and other exception was taken in the behalfe of the Wife of *Dalter Hussey*, for that shee being a married Wife was found guilty of Ravishment of Ward, against the Statute of *Westminster* the 2. chap. 39. And it was urged that it was not the intent of the Statute that provided, that he which did Ravish, not having right in the marriage, though he should restore the Boy naked and not married, or should satisfie for the marriage, he shall be punished for the transgression, by Imprisonment for two yeares, and if he shall not restore him, or shall marry the Heire, after the marrying yeares, and cannot satisfie for the marriage, he shall abjure the Realme, or shall have perpetuall Imprisonment. And it was objected that a married woman, was not intended to be within this Statute, for it is apparent, that a married woman hath not wherewith to make satisfaction, and it shall not be intended that she shall have perpetuall Imprisonment, or make abjuration, for this was to make separation betweene the Husband and his Wife, and so it was adjourned. And the Judges moved the parties to compound amongst themselves, see *Michaelmas* 8. *Jacobi*. *Trinity* 9. *Jacobi*.

*Rasch* 9. *Jacobi* 1611. in the Common Bench.

*Mich*. 8. *Jacobi*. Rot. 213.

Kenrick against Pargiter and Phillips.

Common of  
Pasture.

**R**obert Pargiter Gentleman, and John Phillips were summoned to answer to Robert Kenrick Gentleman of a Plea, why they took the Beasts of the said Robert Kenrick, and that unjustly detained against Summes and Pledges, &c. And then upon the said Robert Kenrick by Thomas Pilkington his Attorney doth complaine, that the said Robert and John the fourth day of August the yeare of the Reigne of our now King seventh, at Kings Sutton in a certaine place called Great Greenes took Beasts, that is to say, one Gelding, one Mare, and one Colt of the said Robert Kenrick, and do unjustly detain them against Summes and Pledges, untill, &c. By which meanes he saith he is the worse, and hath losse to the value of twenty pound, and therefore bringeth this suit, &c. And the afore said Robert Pargiter and John Phillips, by John Barton their Attorney, do come and defend the force and injury when, &c. And the said Robert Pargiter in his owne right doth well avow, and the afore said John Phillips as Bailiff of the said Robert Pargiter, doth well acknowledge the taking

taking of the said Beasts in the aforesaid place in which, &c. and justly, &c. Because he saith that the said place, in which it is supposed the taking of the said Beasts to be made, did containe and at the aforesaid time in which it is supposed the taking of the aforesaid Beasts to be made, did containe in it foure Acres of Meadow in *Kings Sutton* aforesaid, which the said *Robert Pargiter* long before the aforesaid time in which, &c. and also at the same time in which, &c. was and as yet appeareth seised of one Messuage and one virge of land with the appurtenances in *Kings Sutton*, in his Demesne as of Fee, and that the aforesaid *Robert Kenrick* the aforesaid time when, &c. and long before was seised of a Messuage and foure Virges of land with the appurtenances in *Kings Sutton* aforesaid, whereof the aforesaid place in which, &c. is, and at the aforesaid time when, &c. and also at the time, to the contrary doth not appeare in the memory of man, was parcell in his Demesne as of Fee. And the said *Robert Pargiter* and *John Phillips* further say, that the said *Robert Pargiter* and all those whose Estate the said *Robert Pargiter* now hath, and at the aforesaid time when, &c. had in the aforesaid Messuage and one Virge of Land with the Appurtenances of the said *Robert Pargiter*, from time the contrary whereof doth not appeare in the memory of man, had and have used to have, and were accustomed to have Common of Pasture in the aforesaid place, &c. For six Horses, Geldings or Mares, two Colts, six young Beasts called Steeres, or young Beasts called Heifers, and two Mares called breeders, in and upon the said Messuage, and one Virge of Land with the Appurtenances, lying and rising in manner and forme following; that is to say, every year, in and from the first day of August called *Lammes* day, untill the feast of the purification of the blessed *Mary* the Virgin, then next following, as to the said Messuage and one Virge of Land with the Appurtenances, belonging, and the said *Robert Pargiter* and *John Phillips* further say, that the aforesaid *Robert Kenrick* of the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. In the forme aforesaid, appearing seised, the said *Robert* and all those whose Estate the said *Robert Kenrick* now hath, and at the aforesaid time in which, &c. had in the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. time out of mind, had and were used and accustomed to have the aforesaid place in which, &c. To their proper use in severalty every year, in and from the feast of the purification of the blessed Virgin *Mary*, untill the first day of August called *Lammes* day then next coming, that by reason, and in consideration thereof, he the aforesaid *Robert Kenrick*, and all those whose Estate the said *Robert Kenrick* now hath, and at the time in which,

which, &c. had in the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. time out of minde, here had and were accustomed to have every yeare from the aforesaid first day of August, called *Lammas* day, and from thence until the aforesaid purification, then next following, Common of pasture in the aforesaid place in which, &c. Only for three Mares or Geldings and no more, and because the Beasts aforesaid in the narration aforesaid, specified over and above the aforesaid other three Mares or Geldings, the aforesayd time in which, &c. were in the aforesayd place in which, &c. the Grasse then growing, there eating, and the Common of pasture of the sayd *Robert Pargiter*, overcharging, and doing damage to the sayd *Robert* there, the sayd *Robert Pargiter* in his owne right doth wel avow, and the aforesayd *John Phillips* as Bayliff of the aforesayd *Pargiter* doe well acknowledge the taking of the Beasts aforesayd in the aforesayd place in which, &c. and justly, &c. they then doing damage there, &c.

And the aforesayd *Robert Kenrick* saith, That neither the sayd *Robert Pargiter* for the reason before alleadged, the taking of the aforesayd Beasts in the aforesayd place in which, &c. can justly avow, nor the aforesayd *John Phillips* as Bayliff of the aforesayd *Pargiter*, for the same reason the taking of the Beasts aforesayd, in the aforesayd place in which, &c. justly can acknowledge, Because by protestation that he the sayd *Robert Kenrick*, and all those whole estate the sayd *Robert Kenrick* now hath, and at the aforesayd time of the taking, &c. had in the sayd Messuage and foure Virges of Land, with the appurtenances, whereof, &c. time out of minde, had not, nor used to have, or were accustomed, every yeare at the first day of *August*, called *Lammas* day, and from thence to the next Feast of the Purification then next following, Common of pasture in the aforesayd place in which, &c. onely for three Horses, Mares, or Geldings, and not more, in manner and forme as the aforesayd *Robert Pargiter* and *John Phillips* above have alleadged; for Plea the sayd *Robert Kenrick* saith, That he long before the time of the taking of the Beasts aforesayd, and also at the same time of the taking, &c. was seised of the Mannor of *Kings Sutton* with the appurtenances in *Kings Sutton* and *Astrop* in the County aforesayd, whereof the aforesayd Messuage and four Virges of Land with the appurtenances, whereof, &c. are and at the aforesayd time of the taking, &c. and also time out of mind, &c. were parcell, in his Demesne, as of Fee; and the aforesayd House and foure Virges of Land, with the appurtenances thereof, &c. and of the taking, and likewise time out of mind, were parcell of the Demesne Lands of the Mannor of *Kings Sutton* aforesayd: And the sayd *Robert Kenrick* so of the Mannor aforesayd, with the appurtenances in manner aforesayd



sayd appearing seized, the sayd *Robert*, before the sayd time in which, &c. put his Beasts aforesayd, which then were the proper Beasts of the sayd *Robert Kenrick*, upon the aforesayd House and four Virges of Land with the apputenances, lying and rising in the aforesayd place in which, &c. to eat the Grasse there growing in the sayd place, in which, &c. called *Great Greens*, parcell, &c. the Grasse in the same then growing, feeding, and the aforesayd Beasts were in the place aforesayd, untill the aforesayd *Robert Pargiter* and *John Phillips*, the aforesayd fourth day of *August*, the seventh yeare aforesayd, at *Kings Sutton* aforesayd, in the County aforesayd, at *Great Greens*, parcell, &c. took the sayd Beasts of the sayd *Robert Kenrick*, and those unjustly detained, against Sureties and Pledges, untill, &c. as he above against those complaines, and this he is ready to verifie; whereof, and from which the aforesayd *Robert Pargiter* and *John Phillips*, the taking of the aforesayd Beasts in the aforesayd place, &c. further acknowledge, the sayd *Robert Kenrick* demands Judgment and his damages (by reason of the taking and unjust detaining of those beasts) to be adjudged unto him, &c.

And the aforesaid *Robert Pargiter* and *John Phillips* say, that the aforesaid Plea of the said *Robert Kenrick* above in the Bar avowed pleaded, and matter therein contained, is very insufficient in Law, justly to avoid the said *Robert Pargiter* and the said *John* from justly acknowledging the taking of the Beasts aforesaid, to have and shut up, and that he to the said plea in manner and forme aforesaid pleaded, hath no need, nor by the Law of the Land shall be held to answer, and this they are ready to averr, whereof for default of a sufficient plea of the aforesaid *Robert Kenrick* in this part, the said *Robert* and *John*, as before, demand Judgment, and Returne of the Beasts aforesaid, together with their Damages, &c. To them to be adjudged, &c. And the aforesaid *Robert Kenrick* in respect he hath sufficient matter in Law, justly to avoid the said *Robert Pargiter*, and the aforesaid *John* from justly acknowledging the taking of the said Beasts to be shut out as above alledged, which he is ready to verifie, which truly matter of the aforesaid *Robert Pargiter* and *John* do not answer according to their verifying, they altogether refuse to admit as before, and demand Judgment, and their Damages occasioned by the taking and unjust detaining of the said Beasts, to be adjudged to them, &c. And because, &c. Upon the pleadings the Case was thus, a Freeholder prescribts to have common in parcell of the Demesnes of the Mannor for six Horses and other Cattel in certain Land from *Lamma* to *Candlemas*, &c. that the Lord of the Mannor hath used to have the said Parcell of Land in severall to his owne use, from *Candlemas* to *Lamma*, and in consideration of that, the said Lord hath used to have Common in the said parcell

which, &c. had in the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. time out of minde, have had and were accustomed to have every yeare from the aforesaid first day of August, called *Lammas* day, and from thence until the aforesaid purification, then next following, Common of pasture in the aforesaid place in which, &c. Only for three Mares or Geldings and no more, and because the Beasts aforesaid in the narration aforesaid, specified over and above the aforesaid other three Mares or Geldings, the aforesayd time in which, &c. were in the aforesayd place in which, &c. the Grasse then growing, there eating, and the Common of pasture of the sayd *Robert Pargiter*, overcharging, and doing damage to the sayd *Robert* there, the sayd *Robert Pargiter* in his owne right doth well avow, and the aforesayd *John Phillips* as Bayliff of the aforesayd *Pargiter* doe well acknowledge the taking of the Beasts aforesayd in the aforesayd place in which, &c. and justly, &c. they then doing damage there, &c.

And the aforesayd *Robert Kenrick* saith, That neither the sayd *Robert Pargiter* for the reason before alleadged, the taking of the aforesayd Beasts in the aforesayd place in which, &c. can justly avow, nor the aforesayd *John Phillips* as Bayliff of the aforesayd *Pargiter*, for the same reason the taking of the Beasts aforesayd, in the aforesayd place in which, &c. justly can acknowledge, Because by procestation that he the sayd *Robert Kenrick*, and all those whose estate the sayd *Robert Kenrick* now hath, and at the aforesayd time of the taking, &c. had in the sayd Messuage and foure Virges of Land, with the appurtenances, whereof, &c. time out of minde, had not, nor used to have, or were accustomed, every yeare at the first day of *August*, called *Lammas* day, and from thence to the next Feast of the Purification then next following, Common of pasture in the aforesayd place in which, &c. onely for three Horses, Mares, or Geldings, and not more, in manner and forme as the aforesayd *Robert Pargiter* and *John Phillips* above have alleadged; for Plea the sayd *Robert Kenrick* saith, That he long before the time of the taking of the Beasts aforesayd, and also at the same time of the taking, &c. was seised of the Mannor of *Kings Sutton* with the appurtenances in *Kings Sutton* and *Astrop* in the County aforesayd, whereof the aforesayd Messuage and four Virges of Land with the appurtenances, whereof, &c. are and at the aforesayd time of the taking, &c. and also time out of mind, &c. were parcell, in his Demesne, as of Fee; and the aforesayd House and foure Virges of Land, with the appurtenances thereof, &c. and of the taking, and likewise time out of mind, were parcell of the Demesne Lands of the Mannor of *Kings Sutton* aforesayd: And the sayd *Robert Kenrick* so of the Mannor aforesayd, with the appurtenances in manner aforesayd

sayd appearing stiled, the sayd *Roberts*, before the sayd time in which, &c. put his Beasts aforesayd, which then were the proper Beasts of the sayd *Robert Kenrick*, upon the aforesayd House and four Virges of Land with the appurtenances, lying and rising in the aforesayd place in which, &c. to eat the Grasse there growing in the sayd place, in which, &c. called *Great Greens*, parcell, &c. the Grasse in the same then growing, feeding, and the aforesayd Beasts were in the place aforesayd, untill the aforesayd *Robert Pargiter* and *John Phillips*, the aforesayd fourth day of *August*, the seventh yeare aforesayd, at *Kings Sutton* aforesayd, in the County aforesayd, at *Great Greens*, parcell, &c. took the sayd Beasts of the sayd *Robert Kenrick*, and those unjustly detained, against Sureties and Pledges, untill, &c. as he above against those complaines, and this he is ready to verifie; whereof, and from which the aforesayd *Robert Pargiter* and *John Phillips*, the taking of the aforesayd Beasts in the aforesayd place, &c. further acknowledge, the sayd *Robert Kenrick* demands Judgment and his damages (by reason of the taking and unjust detaining of those beasts) to be adjudged unto him, &c.

And the aforesaid *Robert Pargiter* and *John Phillips* say, that the aforesaid Plea of the said *Robert Kenrick* above in the Bar avowed pleaded, and matter therein contained, is very insufficient in Law, justly to avoid the said *Robert Pargiter* and the said *John* from justly acknowledging the taking of the Beasts aforesaid, to have and shut up, and that he to the said plea in manner and forme aforesaid pleaded, hath no need, nor by the Law of the Land shall be held to answer, and this they are ready to averr, whereof for default of a sufficient plea of the aforesaid *Robert Kenrick* in this part, the said *Roberts* and *John*, as before, demand Judgment, and Returne of the Beasts aforesaid, together with their Damages, &c. To them to be adjudged, &c. And the aforesaid *Robert Kenrick* in respect he hath sufficient matter in Law, justly to avoid the said *Robert Pargiter*, and the aforesaid *John* from justly acknowledging the taking of the said Beasts to be shut out as above alledged, which he is ready to verifie, which truly matter of the aforesaid *Roberts Pargiter* and *John* do not answer according to their verifying, they altogether refuse to admit as before, and demand Judgment, and their Damages occasioned by the taking and unjust detaining of the said Beasts, to be adjudged to them, &c. And because, &c. Upon the pleadings the Case was thus, a Freeholder prescribes to have common in parcell of the Demesnes of the Mannor for six Horses and other Cattel in certain Land from *Lammus* to *Candlemas*, &c. that the Lord of the Mannor hath used to have the said Parcell of Land in severall to his owne use, from *Candlemas* to *Lammus*, and in consideration of that, the said Lord hath used to have Common in the said parcell



parcell of Land for Horses only and not more, and the Lord unjustly puts in other Beasts then the said three Horses in the said parcel of Land, and surcharged the Common, and the Free-holder distrayned them doing Damage, and the Lord brings a Replevin, and it was argued that prescription was not good, for that that the Free-holder claimes that as Common without number, in his severall Soyle, the Grantee cannot exclude the owner of the Soyle, 12 H. 8. *Brook*, so of him which hath Common Fishing in the severall of another, he cannot exclude him which hath the severall, 18 H. 6. 16. And it is not like to the Case of the time of *Edward* the first, prescription the 55. Where is Prescription that the Owner of the Soyle shall be excluded from his Common for part of the year, for there the other claimes all the Vesture of the Land, and so may well exclude the Lord, but not when he claimes it but as Common, but it was agreed that by Lawes by the Commoners consent they may order that their great Cattell shall be put in in such Feild only, untill such a Feast, and after that for sheep and swine, and this is good, as it appears by 46 Ed. 3. 25. And *Coke* cheife Justice said, that such prescription to have Common and to exclude the Owner of the Soyle, is not good, and he saith that so it hath been adjudged between *Whyte of Shirland*, 31 Eliz. And in *Cletherwoods* Case of the *Middle Temple*, but he said that Prescription to have all the Vesture of the Land, is good for such a time, and at the first day of the Argument of this Case, *Foster* Justice seemed that the prescription was good, and might have reasonable beginning, that is by Grant, as if they have Common together, and they agree that one shall have all for one part of the year, and the other for another part of the year, and that shall be good, to which *Coke* answered, that that cannot be by Prescription to have that as Common, and at another day *Coke* cited *Shirland* and *Whites* Case to be adjudged, 26 of Eliz. in the Kings Bench, to be prescription to have common in the Waste of the Lord, and to exclude the Lord to have common in the place, and adjudged to be void prescription, and also he cited a case between *Chimery* and *Fist*, where prescription was to have common in the Soile of the Lord, and that the Lord shall have feeding but for so many cattell, and adjudged that the Prescription was not good to exclude the Lord, but a man may prescribe to have the first Crop, or the first Vesture of anothers Land, and it is good, and with that agrees the resolution in *Kiddermisters* Case in the Stat-Chamber, *Warburton* Justice said, that this prescription is not for the excluding of the Lord, but for their good ordering of their Lands, according to the Book of 46 Ed. 3. 25. before cited, that the great Cattell should have the first feeding, and after that the sheep: *Coke* said, that if it had appeared by the pleading, that all the Demesnes of the

the Lord ought to be common, and in consideration, that the Lord had inclosed part, and injoyed that in severall, the Free-holders and Tenants of the Mannor which have Common over all the Residue, and exclude the Lord, and this shall be good by prescription, and it is adjourned, see 15 Ed. 2. *Fitzherberts* Prescription 11.

And afterwards in *Trinity Terme* 1612. 10. *Jacobi*, this case was moved againe, and all the Justices agreed as this Pleading is, Judgment shall be given for the Plaintiff, and they moved the parties to replead.

*Pasch. 9. Jacobi, in the Common Bench.*

*Portington against Rogers. Trin. 8. Jacobi, Rot. 3823.*

**M**ARY *Portington* brought a Trespasse against *Robert Rogers* and others Defendants for the breaking of her house and Close, upon not guilty pleaded and speciall Verdict found, the Case was this, A man had Issue three Daughters, and made his Will in writing, and by that devised certain Land to the youngest Daughter in taile, the Remainder to the Eldest Daughter in taile, the Remainder to the middlemost daughter in taile, with *Proviso*, that if my sayd daughters or any of them, or any other Person or persons before named, to whom any estate of Inheritance in possession or Remainder, of, in, or to the said Lands, limited or appointed by this my last Will and Testament, or to the Heires before mentioned of them or any of them, shall joyntly or severally by themselves, or together with any other, willingly, apparently, and advisedly, conclude and agree, to or for the doing or execution of any Act or Devise whereby or wherewith the said Premises so to them intailed as aforesaid, or any part or parcell thereof, or any estate or Remainder thereof, shall or may by any way or means be discontinued, aliened or put away from such person or persons and their Heires, or any of them, contrary to mine intent and meaning in this my Will, otherwise then for a Joynture, or shall willingly or advisedly commit or do any act or thing, whereby the premises or any part thereof, shall not or may not descend, remaine, or come to such persons, and in such sort and order, as I have before limited and appointed by this my last Will and Testament, then I will limit, declare, and appoint, that then my said Daughter or Daughters, or other the said person or persons before named, and every of them, so concluding and agreeing, to or for the doing or execution of any such act or Devise as is aforesaid, shall immediately from and after such concluding and agreeing loose and forfeit, and be utterly barred and excluded of and from

Trespasse.

all and every such Estate, Remainder, and benefit, as they or they, or any of them should, might, or ought justly, to have claimed, Challenge, and demand of, in, or to so much thereof, as such conclusion, or agreement shall extend unto or concern, in such manner and form, as if the or they, or any of them, had not been named nor mentioned in this my last Will and Testament, and thus the Estate of such person, &c. shall cease and determine; &c. And after that the youngest Daughter took a Husband, and then she and her Husband concluded and agreed to suffer a Recovery, and to barr the Remainder, and upon that the Plaintiff being the eldest Daughter entred, and upon the Entry brought this Action: And Harris Serjeant argued for the Defendant, that this shall be a condition and not a limitation, and he said that *Mews and Scholasticus* Case is not adjudged against him, for the Commentaries, 4. 1. 1. And it shall be taken strictly, for that, that it comes in Defeasans of the Estate, and then admitting it is a condition it is not broken, for this conclusion and agreement is only the agreement of the Husband, and though that the Wife he joynd, yet be that for her benefit or prejudice, that shall be intended only the Act of the Husband, and he only shall be charged, as in the 48. Ed. 3. 18. Husband and Wife joyne in Contract, and the Husband only brings Action upon that, and 45. Ed. 3. 11. Husband and Wife joyne in Covenant, and the Action was brought against them both, and it was shewed, for that shall charge the Husband only; 24. Ed. 3. 38. The Husband and the Wife joyne in an Action upon the *Statute of Laborers*, and the Writ abated, and so in cases of Free-hold, as 15. Ed. 4. 29. 1. The Husband and the Wife being Tenants for life, joyne in paying aid of a stranger, and this shall be no forfeiture of the Estate of the Wife, and 48. Ed. 3. 12. a. *Statute Merchant* was made to the husband and Wife and they joynd in Defeasans, that shall not be Defeasans of the Wife, and 28. H. 8. Dyer 6. The Husband of the Wife Executrix, aliens the Tearme which was let to the Testator upon condition, that he or his Executors should not alien, and by *Radwin* by the alienation of the Husband the Condition was not broken, for it was out of the words, so here the agreement and conclusion being made by Husband and Wife shall be intended the Act of the Husband only, and so out of the Words, and by consequence, out of the intent of the Condition, and shall be taken strictly, but he seemed that the Condition shall be void, for the Words (conclude and agree) are words uncertain, for what shall be said conclusion and agreement within the said Provision, and for that as it seemed it is so uncertain as going about, but admitting that it is good, yet it shall be good but to some purpose, but not to restraints the Daughter which was Tenant in tail, to do lawfull Acts, as to suffer



for a Recovery, or to levy a Fine, as it is resolved in *Milbourn's* case, 6 Coke 40. By which it appears that she hath as well power to dispose that by Recovery as of Fee simple, notwithstanding that the Reversion remains in the Giver, as it appears by 12 Ed. 4. 3. For all lawfull Acts made by Tenant in taile shall binde the Issue, as 44 Ed. 3. *Olivian Lambards* Case, Grant of Rent for Release of right in good, and shall binde the Issue, for there are foure incidents to an Estate taile, First, That he shall not be punished for Waste. Secondly, That his Wife shall be indowed. Thirdly, That the Husband of the Wife Tenant in Taile, shall be Tenant by the Courtise. Fourthly, That Tenant in Taile may suffer common recovery. So that a Condition which restraines him so that he cannot suffer a common Recovery is void, for it is incident to his act, and it is a lawfull Act, and for the benefit of the Issue as it is intended, in respect of the intended recompence, and he said that a Feoffment to a woman covert or infant, shall be conditionall, that they shall not make a Feoffment during their disability, is good, for that the Law hath then made them disable to make a Feoffment, so a Lease for life or years upon condition that he shall not alien, is good, in respect of the confidence that was reposed in them by the Lessor, and so concluded that the Condition in this Case which restraines Tenant in Taile generally from alienation. First, was uncertain in respect of the words (conclude and agree) Secondly for that it was against Law & so void, and for that prayed Judgment for the Defendant.

*Hutton* Serjeant for the Plaintiff, he argued that the verbal agreement of the Wife shall bind her, notwithstanding the Coverture, for that, that this is for her benefit, for in performance of the said agreement, she suffers a recovery to the use of her selfe and her Heires, and so Docket the remainder, and he agreed the cases put by the other part which concerne free-hold, but he said in cases of Limitation of Estates, as if Limitation be, if a Ring be tendered by a woman that the Land shall remaine to her, and she takes a Husband, and after that she and the Husband tender the Ring, this shall be sufficient tender, and it shall be intended the Act of the wife, and 10. H. 7. 20. a. A man devises his Lands to a married woman to be sold, she may sell them to her Husband; And though that it be not any agreement of the Husband only, yet here is an act done, in a *Precipe* brought against the Wife, and she vouches over, for that is not only an agreement, but an Act executed, upon which the Estate Limited to the eldest Sister shall take effect, and the 2. Coke the 27. a. *Beckwith's* Case. If the Husband and the Wife, joyne in a Fine of Land of the Wife, the Wife only without the Husband may declare the use of that. And he intended it was a Limitation and not a condition,

and so it might be well at this day in case of devise, and then the Act shall be, that the Estate is Limited to have beginning, being made the Estate of the youngest Daughter which made the Act, shall be destroyed and determined, for if it be a condition, then all the Daughters shall take advantage of that, and this was not the intent of the Devisor, for they are the parties which should be restrained by the devise from Alienation. And also be cited *Wentlocke and Hamonds Case* cited in *Bratltons Case*, 3. *Coke* 20. b. Where a Copy-holder in fee of Lands devisable in Burrough *English*, having three Sons and a Daughter, deviseth his Lands to his eldest Son, paying to his Daughter and to his other Sons forty shillings within two years after his death, the Devisor maketh surrender according to the use of his Will and dieth, the eldest Son admitted, and doth not pay the money within the two years, and adjudged that though the word payment makes a condition, yet in this case of devise the Law construes that to a Limitation, and the reason is there given to be, for that, that is, it shall be a condition, then that shall descend upon the eldest Son, and then it stands at his pleasure, if the Brothers or Sister shall be paid, or not, and 29. *Affis*. 17. cytes in *Nourse and Scholasticus Case*, Commentaries 412. b. where a man seised of Lands in Fee devisable, deviseth them to one for life, and that he should be Chapleine and singe for his Soule all his life, so that after his decease, the sayd tenements should remaine to the Commonalty of the same Towne, to finde a Chapleine perpetuall for the same Tenements, and dyed, and adjudged that this shall not be a condition of which the heir shall take advantage, but limitation upon which the remainder shall take effect, and also he cyted *S. E. Chiers Case*, 6 *Coke* 18. a. b. & 11 *H.* 7. 17. & *Pennants Case*, 3 *Coke* 65. a. That if a man makes a Lease for years, upon a condition to cease, that after the condition is broken, grantee of reversion may take advantage of that; so he said in the case at the Bar, when the first Estate is determined and destroyed by the limitation, then he to whom the Remainder is limited shall take advantage of that, and not the Heire, for as he intended an Estate of Inheritance may as well cease by limitation of devise as tearme, as in 15. *Ed.* 4. Lands are given to one so long as he hath heires of his body, the remainder over, and if he dye without heires of his body, the remainder over shall vest without entry, and the Free-hold shall vest in him; and 2. and 3. *Phil.* and *Mary*, *Dyer* 127. and 56. *Fisher* and *Harvot Case*.

If a man devise Lands to one for life, the remainder over upon condition that if he do such an act that his estate shall cease, and be in remainder may immediately enter, there he in remainder shall take advantage though he be a stranger, for that that the Estate deter-

mines

mines there without re-entry : And he saith, that the Case of *Wellock* and *Hamond*, cyted in *Barassons* Case, was a stronger Case then this, for there the limitation was upon Fee-simple, and here it is upon an Estate tayle ; and the Law hath favourable respect to devise, as in *Barassons* Case, is alteration of words for the better exposition of that, for *Shall* is altered to *Should* ; and also see 16 *Eliz. Dyer* 335. 29. for the marshalling of absurd words in a Will for the expounding of that ; and 18 *Eliz. Cheekes* Case, he cyted to be adjudged, that if a man devise his Lands to his Wife, and after her death to his Son, and the remainder to his sayd Wife in Fee-simple, the Husband of the Wife having Issue, shall not be Tenant by the Curtesie, for alwayes the Judges have made such favourable construction of Wills, that if Estates devised by Will might be created by act executed in the life of the party, then it should be good by devise ; and to the objection ( that conclusion and agreement is uncertaine, and so for that shall be voyd ; he saith that it is not so uncertaine, as going about, or resolve and determine an attempt or procure, as in *Barbas* Case, first of *Coke* 83. 6. or as attempt or endeavour, as in *Germans* and *Arscotts* Case there cyted, fol. 285. 2. See 6 *Coke* 40. 4. *Mildmayes* Case, and also the words subsequent are repugnant, that the Estate tayle shall cease, as if the Tenant in tayle were dead, and not otherwise, which is absurd and repugnant, for the Estate tayle doeth not determine by his death, if he doe not dye without Issue. And also he sayd ; that it is more reasonable that the perpetuity in *Schulasticus* Case, for here the limitation depends upon agreement, which is a thing certaine, upon which the Issue may be joyned ; and also the condition doth stand with the nature of the Estate tayle, and for the preservation of it ; and Recovery is against the nature of it, for this destroyes the Estate tayle, and is onely a consequent of it ; and not parcell of the nature of the Estate, and this is the reason that *Littleton* saith, That an Estate tayle upon condition that he should not alien, is good, for that preserves the Estate, and also preserves *Farmedon* for him in reversion, if there be a discontinuance ; and with that agreed 13 *H. 7.* 23. 24. and he sayd, that there was a Judgement in the point for his Client for another part of the Land, and he cyted 31 *Edw. 5. Fitz. Feoffment placo the last.* and *Fitzberborts Natura brevium (Ex gravi querela)* last Case ; and so concluded and prayed judgement for the Plaintiff, and this Case was argued againe by *Shirley* Serjeant for the Defendant, and he intended that the agreement is voyd to the Wife, and shall be intended the agreement of the Husband onely, for a married Wife cannot countermand livery, 21 *Affis.* 25. and if a Woman makes a Feoffment upon condition to enfeof upon request made by her, and she takes a Husband, she cannot make request after coverture, 35 *Aff-*



*Assurum*: So that he intended that this shall be intended the agreement of the Husband onely, and not of the Wife, and yet he argued that Declaration of a use by a married Wife, shall be good, according to *Beckwiths Case*: But he sayd, That the reason of that is, for that that she is party to the Recovery, which is a matter of Record, and as long as the Record remains in force, so long the Declaration of the use shall be good; and also he argued, that if the condition being, that if the Wife conclude or agree to any act to make discontinuance, that then, &c. that that shall be intended unlawfull act, and Recovery is no unlawfull act, and for that shall not be within the restraint of the Condition, as the Earl of *Arundells Case*, 17 *Elix. Dyer* 343. and admitting that it is a limitation, yet it shall be of the same nature as a condition, and as well as a condition, this Tenant in tayle shall not suffer Recovery, is voyd.

So also is such Limitation void, and so it was intended before the Statute of *Donis Conditionalibus*, and it appeares by the pleading, that the parties did not intend to take advantage of the agreement, for it is pleaded that at the time of the Recovery suffered, the youngest Daughter was seised of an estate tayl, the which could not be if her estate were determined and destroyed by the (agreement and conclusion) so that the last words make the Forfeiture, for the first are not unlawfull, and before the execution of the Recovery the estate tayl is determined, and so he concluded, and praied Judgement for the Defendant, *Barker* Serjeant argued for the Plaintiff; It shall be intended a Limitation and not a condition, for a Will shall have favorable construction according to the intent of the Devisor, for a Joyntenant may devise to his Companion, 49. *Ed. 3.* and *Fitz. Na. Bre. Ex gravi querela*, last case. A man devises Land to his Wife for life upon condition, that if he marry, that it should remain over to his Son in tayl, and the Wife marries, and the Son in remainder sues (*Ex Gravi querela*) by which it appeares that it was a Limitation and not a condition, and 34. *Ed. 3.* devise was to one for life upon condition that if his Sonn disturbed him, that then it should remaine over in taile, upon disturbance; he in Remainder in tail brings *Formedon*, by which it appears it was a Limitation, and with that agrees all the Justices in 29 *Assurum* 17. And *Welbeck* and *Hamonds Case* cited in *Barastons Case* before, and 18. *Elix. Dyer*. If Land be limited to no third person by the Devise, then the Heir shall sencer for breaking the condition, and also he said, that it appears by *Littleton*, and 13 *H. 7.* 23. and 24, and 20 *H. 7.* and 17 *Elix. Dyer* 343. the Earle of *Arundells*, case which conditioneth that Tenant in taile shall not alien, standeth with his Estate, but not with Fee simple, and so it is adjudged in *Newes* and *Scholasticus Case*, which is adjudged

judged in the point, which as he saith cannot be answered, and the Words of the Condition are not that her Estate taile shall cease as if she had been dead, but as if she had not been named, which is not so repugnant or absurd as the other, and this compared to 34 Ed. 3. Where the Estate was limited till it was disturbed.

And be also argued, that the agreement of the Wife shall be a forfeiture notwithstanding the coverture, for when the Estate is granted upon such condition, he which hath the estate shall make it subject to the condition, as if two Lessors are, and one seale the Counterpart onely, yet the other shall be bound by the Covenants contained in it; and 38 H. 6. 32. a Woman disavows to be Executor, notwithstanding that shee was married, and if *Precept* had been brought against the Husband and Wife, the default of the Husband shall binde the Wife, and so she shall be punished for waste made during the coverture, and so concluded, and prayed judgement for the Plaintiff: *Foster* Justice, that an Estate of Free-hold shall not cease by agreement or conclusion without entry, for it is a matter of Inheritance and Free-hold, and it is not like to 33 H. 6. 31. which concerns Chables and Goods; and *Walsley* Justice accorded with him: *Forster* Justice, it hath been adjudged in *Scholasticus* Case, that the condition was good; and therefore he would not deliver his opinion without argument; *Coke* cheif Justice, that the agreement is void to a Woman married, for then she was married to a Husband, whom in her life she could not contradict, and a Devise upon Condition, that if she conclude or agree, as this Case is, is void, for it is a bare communication, upon which the Inheritance doth not depend, and so he said, it hath been twice adjudged, 6 in *Corbett* Case, and *Germain* Case, and *Arscott* Case, and *Richells* Case in *Litlaton*, it was upon condition that he should not alien, and this was adjudged to be void; but yet if the condition were if he alien, and not if go about or intend, or conclude, or agree as in the case at the Bar, for there is no such case in all our Bookes as this.

Secondly, For that, that the Words are, if they do any act, that then the Estate shall cease, and this is repugnant, for when the Act is done, then the Estate taile is Barred, and cannot cease, but if it had been but a Reoffment, then the right had remained, and he said that such a condition had been void before the Statute of *Donis Conditionalibus*, when it was but Fee simple Conditionall, be it a Condition or Limitation, and he said that *Scholasticus* Case is of Fine which is only discontinuance till the Proclamations are past, and if dead before may be avoided by *Reverter*, in *Germain* and *Arscott* Case, the Condition was, that if he go about or endeavour, and this was adjudged to be void, though that it be in devise in respect

spect of the uncertainty, and he said that the (agreement or condition) is so uncertain, and may be well compared to that, for here the Estate shall cease by the agreement, as well as it may cease by the going about, also he seemed that the Freehold cannot cease without entry, for if use cannot cease without entry as he intends, much less a Freehold cannot, though it be by Devise, and he seemed that it shall be no limitation, but a Condition, and judgment accordingly, if cause be not shewed the next Term. And in *Trinity Term* then next ensuing this Case was argued againe by *Dodridge Serjeant* of the King for the Plaintiff, and he said that there are three questions to be disputed. First, If it be a good limitation. Secondly, If the recovery be a breach of that. Thirdly, Admitting that it may be broken, if the agreement of the Husband and the wife shall be said to breake it; and to the first he seemed that it is a limitation and not a condition, and such a Limitation that well might be with the Law, and that it is a Limitation it is agreed in *Scholasticus Case*, *Commentaries*, and the reason of the Judgment there is, that if the intent of the Devisor appears, that neither shall take benefit of that and not the Heire, that then it shall be but a limitation and not a Condition, and he in remainder shall take benefit of that, and for that in the principall case *Mary the Eldest Daughter*, to whom the Remainder was limited, shall take benefit of that, and with this agrees the case of *Fitz. N. Bro. Ex gravi querela* last case, that if a man devises Lands to his Wife for life, upon condition that if she marry that the Land shall remain over, and after she marryes, and he in Remainder sues by (*Gravi querela*) by which it appears that it is a limitation and not a condition, and with this agrees 2. and 3. *P. and M. 127. Dyer, Jasper Warren Case*, where a man devises land to his Wife for life, upon condition to bring up his Sonne, Remainder over, and agreed to be a limitation and not a condition, and so he concluded this first point, that it is a limitation and not a condition. Secondly, that it is a lawfull limitation, for there is not any repugnancy in that, as it is in *Corbett* before cited, for there are no words of going about, for he agreed that this is absolutely uncertain and void, and so is *Germin & Arden* case, where there is not only a going about, but repugnant going about for he ought to go about and before discontinuance, and then his Estate shall be void from the time of the going about and before discontinuance, but here it is upon (conclude and agree) plainly and apparently, and conclude and agree is issuable, and a Jury may try that, and it will not invegle any man, but the Law will not suffer Issue upon such uncertainty as going about or purposing, but Attornements and Surrenders are but agreements, and yet are Issuable: And so in the principall case, and in *Mildmayes Case* 6 *Coke* it is agreed



greed that a condition that a Tenant in taile shall not suffer a Recovery is void, for Recovery is not restrained by the *Statute of Westminster* 2. but here it is not so but in generall, that he shall not conclude or agree to alien or discontinue, but that which cannot be a condition good in the particular, may be good in the generall, as *Littletons Case*, gift in taile upon condition that he should not alien is good, otherwise of Fee simple, with which 10 H. 7. 11. and 13 H. 7. 23. 24. accordingly.

Thirdly, That it is a breach of the limitation, Condition, that alienation and discontinuance be by Recovery, which is a lawfull act, and it is a privilege incident to the Estate taile, and though that the agreement was made by the Husband and the Wife during the Coverture, and so should be if the Husband and the Wife had levied a Fine, see 10 H. 7. 13. Condition, that if the condition had been expressed that they should not levy a Fine had been void, and here this verball agreement betwixt the Husband and the Wife and the third person shall be for Forfeiture of their Estates, for this is the agreement of the Wife as well as of the Husband, as it appears by *Becwithes Case* 2. *Coke* before cited, where the Husband and the Wife agree to levy a Fine, and that the Fine shall be to the use of the Commisee, this is good declaration of the use, though that it be of the Land of the Wife and during the Coverture, and cannot be avoided by the Wife after the death of her Husband, for it was the agreement of the Wife, though it be not by any Indenture to declare the use of the Fine, so many acts in the Country made by the Husband and the Wife, shall be intended the act of the Wife, as well as of the Husband, as in the 17 Ed. 3. 9. The Abbot of *Peterboroughs Case*, the Husband and Wife granted Rent for equality of partition, and this shall binde the Wife after the death of the Husband, for it is her act as well as the act of the Husband, and shall be intended for her benefit, and so hereby the Recovery the Wife shall be Tenant in Fee simple, which was Tenant in taile before, and 34 Ed. 3. 42. feoffment to a married Wife upon condition to re-entfeoff, and she with her Husband makes the re-entfeoffment it is good; so a Woman being Lessee for Life, and with her Husband attorn upon a Grant of Reversion, is good, and shall binde the Wife after the Death of the Husband, 3 Ed. 3. 42. 4 Ed. 3. *Attornment*, 12. 15 Ed. 3. *Attornment*, also this Estate was made to the Wife when she was sole, and for that it shall be accounted her folly, that she would take such a Husband that would forfeit her Estate, but with that agreed the reason of the Booke of 10 H. 6. 28. Where a woman Tenant was bound by the ceasing of her Husband, and so he concluded and prayed Judgment for the Plaintiff, and so it was adjourned, see another argument of this case in *Michaelmas Term* 9. *Jacobi* 1611. by *Haughton and Nicholls* Serjeants.

— Pasch. 9. Jacobi, 1611. In the Common Bench.

*Pitts against Dowse.*

*Ejectione firmæ.*

**I**N an *Ejectione firme* upon not guilty pleaded, The Case was this, A man makes his Will, by these words, I bequeath all my Lands to my Son *Richard*, except my Chauntry Lands. And I devise all my Chauntry Lands to be divided amongst all my Children, men and women alike, except my Son *Richard*. And if *Richard* die without Issue, the remainder to *A.* My second Son, the remainder to *B.* My third Son, the remainder to *C.* My fourth Son, the remainder to my next of blood, and so from Heire to Heire. And so likewise I would to be done upon my Chauntry Lands and Tenements, in case all my aforefaid Children die without Issue. Then I would the one halfe of my Chauntry Lands to remaine to the next of kin, and the other half to the Hospitall of *M.* And the question was, what estate the Heire of the eldest Son shall have in the Chauntry Lands, and it was argued by *Dodridge* the Kings Serjeant, that the Heire of the eldest Son shall have estate tayl in the Chauntry Lands, the Devisor devises no estate to *Richard* his eldest Son in the Chauntry Lands, nor limitts any estate of that in certaine, and for that he seemed that the youngest Sons and Daughters shall be Tenants in Common for life, and by this manner of Interpretation, every part of the Will shall be, for first he excludes *Richard* himselfe, so that he shall have nothing in that, and then by the Limitation to the younger Children to be equally divided between them, makes them Tenants in Common, see 28. H. 8. 25. *Dyer* 155. And he cited *Lewin and Coxes* Case, to be adjudged, *Michaelmasse* 41. and 42. of *Eliz.* Pasche 42. *Eliz.* R. 207. Where a man devises Lands to his two Sons to be equally divided, and adjudged that they are Tenants in Common; so devise to two part and part like, and equally divided, and equally to be divided is all one, and for that there is no other words to make an estate of Inheritance, it shall be an estate for life, and the remainder shall be directed according to the estates limited of the other Land. And he seemed that the words in the last sentence, all my aforefaid Children, shall extend to *Richard* his eldest Son, as well as to the others, and so all the Will shall stand in his force, which may be Objected that *Richard* the eldest Son shall be excluded out of the Possession, and for that see 6. *Eliz.* *Dyer* 333. 29. *Chapmans* Case, and also he cited one case to be adjudged, *Trinity* 37. *Eliz.* R. 632. betweene *Bedford* and *Vernam*, where a man deviseth all his lands in *Atworth*, and afterwards purchaseth

chafeth other Lands in the same Town, and afterwards one comes to him to take a Lease of this Land newly purchased, which the Testator refused to Let. And said, that these Lands newly purchased should goe as his other Lands. And upon his Death bed adds a Codycell to his Will, but saith nothing of his purchased Lands, and adjudged that the purchased Lands shall passe, and so concluded and praied Judgement: *Harris* Serjeant, that it is a new Sentence, and *Richard* is excluded and it shall be a good Estate tayl to the youngest Children, and foresayd Children shall be intended them to which the Chauntry Lands are limited, see *Ratcliffes* case 3. of *Coke* adjudged, that they shall be Tenants in Common by the devise to be equally divided, and shall not be surviving, but every youngest Children shall have his part in tayl, though that the first words do not containe words of Inheritance, yet the last words, in case all my Children die without Issue, declares his intent that they should have an estate tayl, see the 26. of *Eliz.* *Dyer* 339. 30. *Clashes* Case, that when he hath disposed of part devised to *Richard*, then disposeth of the residue, and the sentence begins with ( And so likewise ) and that shall be intended in the same manner as he had disposed of the Lands devised to *Richard*, for he hath devised the remainder otherwise, that is, to an Hospitall, and so concludes and praies Judgement accordingly, *Coke* chiefe Justice saith, that it was adjudged between *Coke* and *Prinches* 29. *Eliz.* that if a man devise a house to his eldest Son in tayl, and another house to his second Son in tayl, and the third house to the third Son in tayl, and if any of them die without Issue, the remainder to the other two equally, this shall be but for life, for this enures to the quantity of the Land, and not to the quality of the Estate: And he said that *Richard* is excepted without question, for it is but a Will, and every of the youngest Sons therein shall have the Chauntry Land one after another, and *Richard* shall have no part, and the Chauntry shall have nothing till they all are dead, and he likened that to *Frenchams* Case, where Lands were given to one and to his Heires Males, and if he died without Issue, the remainder over, the Issues Females shall not take, though that it be if they die without Issue, for expresse it makes to cease only, and so it was adjourned.

## Peto's Case.

**P**eto suffers a common Recovery, to the use of himselfe for life, the remainder to his eldest Son in tayl, with diverse remainders over, to the intent that such Annuities should be paid

Common Recovery.



as he by his last Will or by grant declares, so that they did not exceed the sum of sixty pound, and if any of the said Rents be behind, then to the use of him to whom the Rent shall be behind, till the Rent be satisfied with clause of distresse: Rent of twenty pound was granted to his youngest Son for his life, the grantee distraines for the Rent, and in *Replevin* avowes, the Plaintiff replees, that by the non-paiement the use riseth to the youngest Son, by which it was objected that the Rent shall be suspended; *Quere* if without demand, or if the distresse shall be demanded, or that the use shall not rise till after the distresse, and to the distresse well taken, and agreed by all that the Plaintiff shall take nothing by his Writ, and that the eldest Brother hath nothing in the Land.

Judgement in  
Debt.

Judgement was had against a Defendant in Debt, and *Capias* to satisfie awarded, and (*Non est inventus*) returned, and *Scire facias* awarded against the Bayl, and upon the first *Scire facias*, the principall Defendant yeelds his Body in execution, and it was very good, for before that the Bayl had no day in Court, and in the Kings Bench if the Defendant yeelds his Body upon the second *Scire facias* it shall be accepted; And if a man be Bayl upon a Writ of Error, if the Judgement shall not be reversed, he shall be in execution againe: It was objected by *Hutton* Serjeant, that the *Scire facias* is against the Bayl, to know why the execution shall not be awarded against the Bayl, and that ought to be delivered to the Sheiriff, before the day of the returne, or otherwise it shall be Erroniously awarded, and then the party may yeeld his Body to Prison at any time, and discharge his Bayl, and agreed that Bayl in this Court may be released.

Accompt.

Accompt doth not lie for any sum certaine.

*Pasch. 9. Jacobi 1611, in the Common Bench.*

John Reyner against Powell. See *Hillary 8. Jacobi, 136.*

Custom.

**H**oughton Serjeant argued, that there shall be a good Estate tayl of a Copy-hold, and that by the custome after the making of the Statute of *Westminster 2.* And he agreed that at the Common Law, all estates were Fee simple absolute or conditionall, and that the estates tayl were created by the Statute of *Westminster 2.* And do not exclude customary estates, as it appears by *Littlton*, who saith, that Tenant at will by copy of Court Roll by custome may be in Fee simple, and so of estate tayl, and with this agree many other Authors, 15 *H. 8. 6.* Tenant by Copy-hold of Court Roll resolved in the point, and that a *Formedon* in the descender lieth for that,

that, and as the Statute of *Westminster* 2. divides estate tayl and Fee simple, So may custome of a Mannor as well as custome make an estate at will, which is personall and determines by the death of any of the parties to discend, and as well as the custome of *London* (of not moving things fixed) is created by custome, as well may *Formedon* be created by Custome, and also the Statute is, that gives *Cui in vita*, extends to a Copy-hold, so the Statute of Limitation, as it appears by *Brooke*, Limitation, 5 *Ed.* 6. And with this agrees also *Heydons* Case, and though that the words are, *Voluntas Donatoris* in the Charter, &c. Yet the estate tayl may be created by devise. So that the Statute shall not have such literall construction, and as well as a Lease for a hundred yeares may be within the Statute of 11. *H.* 7. Which speaks only of discontinuances, as it appears by *Sir George Brownes* Case, 3. *Coke*, So may a Copy-hold estate which is but an estate at will be within the Statute of *Westminster* 2. and it is confest by the other part, by pleading that he was seised in tayl according to the custome of the Mannor, and it is not pleaded that he had Issue at the time of the Alienation, and the other party claimed by the Alienation, the which was not good, if he had no Issue at the time of that if he had but Fee simple conditionall, and so concluded and praied Judgement, &c.

*Dobidge* Serjeant of the king saith, that the reputation of the estate consists upon two parts, first the name, secondly the nature of the estate tayl, and for both the makers of the Statute of *Westminster* 2. had no intention that this should extend to Copy-hold, and first for the name, which gives the being, he cited *Fitz. Natura Brevium*. 12. *C.* where it is sayd, that Copy-Tenants, or Copy-holders, or Tenants by copy, is but a new Terme found, for of auncient times they were called Tenants in Villenage or of base tenure, as this also appears by the old Tenures, by which it appears that then they were called and named Tenants, which held in Villenage or of base tenure, and *Bracton*, booke 2. chap. 8. in the end speaks of that, and calls them Villaines, Sokemaines, and that if such a Tenant will transfer his Tenement, let it be delivered into the hand of the Lord or his Steward, and he wrote immediately before the Statute of *Westminster* 2. and agreed with *Fitz. Na. Bre.* And also *Bracton*, booke 4. fol. 209. Saith, that such Tenants have used to Plow the Demesnes of the Lord, and calls and names them as before, and 4. *Ed.* 1. He is called *Customarius*; So that Custome doth not make the certainty of his estate if he hath any, and he said that 42. *Ed.* 3. 25. is the first in Law, in which is any mention of these Lands, and there they are called *Neifs* Lands, and 14. *H.* 4. 323. u. they are called Sokemaines by base.

base Tenure, and *Lambert* calls it *Falkland*, by which and several names he saith, that the baseness of the Estate appeares, And to the estate he saith that originally it was but at the will of the Lord, though that it be according to the Custome of the Mannor, so that the Lord cannot put him out if he performe the services. And the Register doth not respect him, for he hath not framed any Originall for him, to give him remedy by the Common Law, but only in the Court of the Lord, though that erroneous Judgment be given: Also he cannot prescribe but in the name of the Lord, as it appeares by 18. Ed. 3. *Fitz.* prescription, that such estates which are incident to Fee simple, as Dower, not Tenants by the Custise cannot be derived out of this without Custome, nor that warranted. So that his reputation appeares by his name and also by his nature: Also he intended that the makers of the Statute of *Westminster* 2. did not intend that the Statute should extend to this, for it is, *Oppositum in Obiecto*, for Custome is without time of memory. And the Statute of *Westminster* 2. was made 13. Ed. 1. the beginning of which every one knowes. Also the Statute of *Westminster* 2. doth not extend to any Lands, but those which the Tenant might have aliened before the Statute. But the Copy-holder had not any power to alien, for the Lord ought to be his instrument and hand, as *Bracton* saith, to alien, transfer he cannot, but by the hands of the Lord, and it must be restored to the Lord, the words of the Statute are, The will of the giver in the Charter, &c. So that the Statute intends such Lands which may passe by Deed and Fine, and devise his Deeds, and the Deed extends to them, for a Fine is *Chirograph*, and devise to be made by copy of Court Roll is not so, for that is only of Acts made in the Court of the Lord, it cannot be within the Statute, for Copy-hold ought to be held of the Lord, and Tenant in tayl shall hold of the giver, and so cannot a Copy-holder, which hath so base an estate. And if this shall be so, these mischeifes will insue. That is, that this base estate should be of better security, then any estate at the Common Law, for Fine shall not be a Barr of that, for it cannot be levied of that, also Recovery cannot be suffered of that, for there cannot be a Recovery in value neither of Lands at the Common Law, neither of Customary Lands, for they cannot be transferred but by the hands of the Lord.

And to *Listleton* he agreed, and also, 4 Ed. 2. which agrees with this, where it is said that at *Stebenheath*, a Surrender was of Copy-hold Lands to one and the Heires of his Body, but he said, that that shall not be an Estate taile, for then the Estate hath such operation, that this settles a Reversion and Tenure betwixt the Giver, and him to whom it is given, but this cannot be of Copy-hold Land,

for



for this cannot be held of any, but only of the Lord, and to the others, this Estate doth not lye in Tenure, and yet he agreed that of some things which did not lye in Tenure, Estate Tail may be, but Land may be intailed, but Copy-hold Estate is so base, that an Estate tail cannot be derived out of it, so that though that custome may make an Estate to one and the Heires of his Body, yet this cannot be an Estate taile but Fee-simple conditionall, and also he agreed that they might have *Formedon in Descender*, but it is the same *Formedon*, which was before the *Statute*, as if Tenant in Fee-simple conditionall before the *Statute*, would alien before issue, but it was no Estate taile, with the priviledges of an Estate taile before the *Statute*, and to the other matter of Surrender, that is the admittance of the parties which is an Estate taile, that doth not conclude the Court, as it appears by the *Lord Barkleys Case* in the *Commentaries*, where the Estate pleaded severally by the parties is not traversed by any of them, and so concludes, and prayes Judgment, &c. And this case was argued again in *Trinity Term* next ensuing by *Montague* the Kings Serjeant for the *Defendant*, and he said, that there are three questions in the case.

First, If Copy-hold land may be intailed. Secondly, Admitting that it may be intailed, if Surrender makes discontinuance. Thirdly, If it shall be Remitter; and to the first, he seemed that it might be intailed and that it shall be within the *Statute of Westminster 2*. And first for the Antiquity of that, he said that *Littleton* plaied that amongst his Estates of Free-hold, and hath been time out of minde, and is a primitive Estate, and not derived out of the Estate of the Lord, and the Lord is not the Creator of that, but the means to convey that after that it is created, and what is created then shall have all the priviledges and Benefits which are incident to it, and shall be nursed by the custome, and is time out of minde, and the Law alwaies takes notice of it, and he cited, 24 *H.* 4. 323. by *Hankf. Bresson, Fitz. Na. Bre. 12 C. and Brownes Case 4. Coke*, which is not simply an Estate at the will of the Lord, but at the Will of the Lord according to the custome of the Mannor, and when it hath gained the reputation of Free-hold, then it shall be directed according to the rules of the Common Law, and 2 and 3. *P. and Ma. Dier* 214. 60. allow Copy-hold Estate to be intailed, and he saith, That no *Statute* hath more liberall exposition then the *Statute of Westminster 2. 45. Ed. 3.* Incumbrance shall not charge the Issue intailed, also a Copy-holder shall have a *Cui in vita*, also a Copy-hold is within the *Statute of Limitation*; and so upon the *Statute of buying of pretended rights*: And it is alway intended when a *Statute* speaks of Lands and Tenements, that Copy-hold Lands shall be within that: And he saith, That all the Objections which have been made

made of the contrary part are answered in *Heydons Case*, but he relied upon that, that every reall Inheritance is within the *Statute of Westminster 2. 4 Ed. 2. Formedon* lyeth of Copy-hold Land, 25 *Ed. 3. 46.* Estate tayle is of a Corrody and office, which proves, that Copy-hold is a reall Inheritance, and for that shall be within the *Statute, 46 Ed. 3. 21.* Gavelkinde Land may be intailed, 6 *Rich. 2. Avowry 2. 8 Rich. 2. 26.* Copy-holder shall be charged with Fees of a Knight at Parliament, 22 and 23. *Eliz. Dier 373. 13.* Lands in ancient Demesne were intayled, and he said that the reason is, that for that it is Inheritance and time hath applyed them to an Estate, and so concluded, and prayed Judgment for the Defendant.

*Hutton Serjeant* argued for the Plaintiff, that Copy-hold Lands cannot be intailed, for that is but a customary Estate; and the Law doth not take any notice of it, but onely according to Custome, for there were no Estates tayle before the Statute, for then all were free simple absolute or conditionall; that is, either implied, or by limitation, which cannot be of an Estate tayle, which is not within the Statute of *Westminster 2.* for no Actions are maintainable by that, but those which are by the Custome, and a Writ of false Judgment: See *Fitzherberts Natura brevium, 12. 13 Ed. 3. F. Prescription 19.* that it hath no Incidents, which are incident to Estates at the Common Law without Custome, as Dower: See *Revetts Case*, and so is Tenancy by the Curtesie, and there shall be no discent of that to take away Entry, and so of other derivatives: And he seemed that it is not within the Statute for three reasons apparent within the Statute.

First, That it is hard that Givers shall be barred of their reversions; but in case of Copy-holds, the Giver hath no remedy to compell the Lord to admit him after the Estate tayle spent, but onely *Subpna*, and in this Case, the Lord may relieve himselfe for the losse of his services, for that the Statute provides no remedy for him.

Secondly, That the Statute doth not intend any Lands, but those of which there is actuall reversion or remainder, and those which passe by Deed; so that the will of the Giver expressed in the Charter, may be observed, and of which there may be a subdivision, as Lord, Mesne, and Tenant, for there shall be alwayes a reversion of the Estate tayle, and the Donee shall hold of the Donor and not of the Lord.

Also it seems that the Statute doth not intend to provide for any, but those for whom the Writ in the *Formedon* ordained by the Statute lyes, and agreed that for Offices and such like, *Formedon* lyeth, if the party will admit Estate tayle to be discontinued.

Also the Statute intends those things, of which a Fine may be levied, for the Statute provides, that (the Fine in his owne right should be

be nothing) but by Copy-holder Fine cannot be levied, and for that he shall not be within the *Statute*, and if the Words do not extend to that, then the Equity of the *Statute* shall not extend to that, and he said that Copy-hold is not within any of the *Statutes*, which are made in the same year, as the *Statute which gives Elegit*, and such like, and to *Littleton* that an Estate by copy, is where Lands are given in Fee-simple, Fee-tail, and that *Formedon* lies for that with which agrees 10 *Ed. 2. Formedon* 55. It seems that the Estate tail here mentioned, shall be intended Fee-simple conditionall at the Common Law, and the *Formedon in Descender* which was at the Common Law, for alienation before Issue: And so *Littleton* shall be intended; For the Estate is within time of memory; see *Heydens* case, that a Copy-hold Estate is an Estate in being within the *Statute* of 31 *H. 8.* And *Manwood* there said, that in so much the Estate of that is created by custome, and the Estate tail is created by *Statute*, yet it shall not be within the *Statute*, and he said that the case of 13 *H. 8. B. Copy of Court* 24. is repugnant in it self in the words of *Formedon*, for he saith, though that *Formedon* was given by *Statute*, and was no otherwise in *Descender*, yet now this Writ lies at the Common Law, and it shall be intended, that this hath been a custome there, time out of minde, &c. And so he concluded, and prayed Judgment for the Plaintiff.

*Pasche 9. Jacobi 1611. in the Common Bench.*

Yet Bearblock and Read.

SEE the beginning before *Hillary 8. Jacobi*, this Case was argued by *Hutton* Serjeant, that the Plaintiff in the Action of Debt ought to Recover, for if Executor may pay Debt due by the Testator by Obligation, before Debt due by Judgement, this shall be a (*Devastavit*) as it is resolved in *Trewinards* Case, 6. and 7. *Edward 6. Dyer* 80. 53. And he shall be charged for the Judgement with his owne goods. And so it was adjudged between *Bond* and *Hales* 31. *Eliz.* that Judgement at the Common Law shall be first satisfied before the Statute, which is but a *Pockett* Record, and *Medium redditor in invitum*. Also it was adjudged in *Harrisons* Case, 5. *Coke* 28. 6. That Debt due upon an Obligation shall be first payd before Statute with Defeasans for performing of Covenants, the which Defeasens is not broken, and also it is adjudged between *Pemberton* and *Barkham* here cited, that Judgement shall be satisfied before Statute Merchant or Staple or Recognizance, though that the Statute be acknowledged before the Judgement had by the Testator. See this Case in *Harrisons*

See the beginning. fol.



Case, 3. *Coke* 28. b. and in 4. *Coke* 60. in *Sadlers Case*, upon which he infers, that if an Executor first satisfies a Statute or a Recognizance before a Judgement, that this shall be a *Discharge*, as well as if he satisfies an Obligation, first as in *Trentham's Case*, and that when the Plaintiff which hath Judgement, the Executor may aid himself by *Audita querela* by this matter subsequent: *Quere* of *Dobson's Case*, as in 7. *M. C.* 42. in *Dorling* against *Gannish*, and Judgement had for the Plaintiff. If the Judgement be reversed, restitution shall be made to every one which hath losse. So here by *Audita Querela*, if the Executrix hath not more then was taken in execution by the Statute, and it seems to him that the Judgement in the *Scire Facias* shall not be a Bar in this Action, for the Judgement remains, Executrix and the Plaintiff may have Action of Debt upon that. But of the contrary, if the Plaintiff had brought Action of Debt upon the Judgement and had been barred, then shall be barred in *Scire Facias* also; But the Plaintiff this notwithstanding, may have *Scire Facias* upon furmise, that there are new assets, come to the hands of the Executor, and so he concluded and paid Judgement for the Plaintiff. *Nicholls* Serjeant for the Defendant relies only upon the Judgement had upon the *Scire Facias*, and that till that be Defeated, the Plaintiff cannot maintaine Action of Debt, for the Action of Debt is nothing but demanding of Execution, and for that till the first Judgement be Defeated the Plaintiff hath no remedy at the Common Law. All things which barr the Execution of the Judgement in *Scire Facias*, these shall be Barrs in an Action of Debt, as in *Baxters Case* here last adjudged, in an Action upon the Case for slanderous words, the Defendant pleads that he had justified the speaking of these words, at another time in another Action brought against him, and had a verdict and Judgement upon that, and so demands Judgement, and adjudged a good Plea, till the first Judgement is reversed, for Judgement is the saying of the Law, and 13. *Eliz. Dyer* 299. 34. in Debt for Costs recovered in a Writ of entry, the Defendant pleads that the Plaintiff hath sued an *Execio*, which was Executed, and a good Bar in an Action of Debt, and so 11. and 2. *P.* and *M. Dyer* 107. 24. In Debt for Damages recovered in Assise, the Defendant pleads in Barr, that after the verdict given and before Judgement, the Plaintiff entered into the Land, and there no Judgement is given. But it seems if the Plaintiff say of Course that the Common Law prescribes, that then he shall not have Execution, (for of those things which rightly are Acted see there be Executions) but if the Defendant in the first Action had pleaded a release, and Judgement was given upon that against him, he cannot plead that againe, (for it runs into the thing Judged,) &c.

Ed. 3. in Debt against an Executor, and part of the assets found, the Plaintiff cannot have new *Scire Facias* without Avertment that there are new assets, and 34. H. 6. Action with avertment that there are assets, and Judgement good both waies, and presidents shewed of both Courts. And he intended that the Executor could not have helped himselfe by *Audita Querela*, unlesse he feares to be impleaded, but after Execution he cannot have Restitution, and so concluded and praied Judgement for the Defendant. *Coke* cheife Justice, that there cannot be a *Devastavit* in the Wife, unlesse that it be voluntary payment by her, for the Statute of 23. H. 8. gives present Execution of a Statute *Staple* without *Scire Facias*. So that the Wife had no time to plead the Judgement, and for that this unvoluntary Act, shall not be a *Devastavit*, for she is no agent, but only a sufferer. And at the Common Law if the Plaintiff hath Judgement in an Action of Debt after the yeare he hath no remedy, but new Originall, and this mischiefe was remedied by the Statute of *Magna Charta*, which gives *Scire Facias* in place of new Action. But it seemes to him that the Barr in the *Scire Facias* shall retaine good Barr, till it be reversed, as in 2. *Rish.* 3. A man hath election to have action of *Detinue*, or action of *Trespasse*, and he brings his action of *Detinue*, and the Plaintiff wages his Law, and after brings an action of *Trespasse*, and the first Nonsuit pleaded in Barr, and adjudged a good Barr, 12. *Edw.* 4. accordingly: *Kester, Walmesley, and Warburton*, agreed without any doubt, but they sayd, that if the first execution had been had by *Covin*, then it should have been otherwise.

In Debt upon buying of diverse severall things, the Defendant confesseth part, and for the residue the action being brought by an Executor in the *Detinue* only, the Defendant pleads he oweth him nothing, and upon this Tryall was had, and Verdict for the Plaintiff, and after Verdict it was moved, that this misjoyning of Issue was ayded by the Statute of *Jenfailes*; but it was resolved by all the Justices, that it was not ayded, for it was no misjoyning of the Issue, but no Issue at all; but if there had been Issue joyned, though that it were not upon the direct matter, yet this shall be ayded, and at the end the Plaintiff remitted the part that the Issue was joyned, and prayed Judgement for the residue, and this was granted, but if the Plaintiff had been nonsuited that would go to all.

Administrators during the minority had Judgment in debt, and before execution sued, the Executor came to his age of seventeen yeares, and how this execution shall be sued comes the question, for the power of the Administrator was determined by the attaining of age of 17. yeares by the Executor, and the Executor was not party to the Record, and for that he could not sue execution; but it

Debt by Executor.

Administrators during the minority of the Executor.

Case, 17. *Coke* 28. b. and in 4. *Coke* 60. a. *Sadlers Case*, upon which he infers, that if an Executor first satisfies a Statute or a Recognizance before a Judgement, that this shall be a *Discharge*, as well as if he satisfies an Obligation, first as in *Trenyard's Case*, and that when the Plaintiff which hath Judgement, the Executor may aid himself by *Audita querela* by this matter subsequent: *Quere of Debt Druryes Case*, as in 7. *H. 6. 42* in *Devine* against *Garnish*, and Judgement had for the Plaintiff. If the Judgement be reversed, restitution shall be made to every one which hath losse: So here by *Audita Querela*, if the Executrix hath not more then was taken in execution by the Statute, and it seemes so him that the Judgement in the *Scire Facias* shall not be a Bar in this Action; for the Judgement remaines, Executrix and the Plaintiff may have Action of Debt upon that. But of the contrary, if the Plaintiff had brought Action of Debt upon the Judgement and had been barred, then shall he be barred in *Scire Facias* also; But the Plaintiff this notwithstanding, may have *Scire Facias* upon summe, that there are new assets, come to the hands of the Executor, and so he concluded and praised Judgement for the Plaintiff. *Nicholls* Serjeant for the Defendant relies only upon the Judgement had upon the *Scire Facias*, and that till that be Defeated, the Plaintiff cannot maintaine Action of Debt, for the Action of Debt is nothing but demanding of Execution, and for that till the first Judgement be Defeated the Plaintiff hath no remedy at the Common Law. All things which barr the Execution of the Judgement in *Scire Facias*, these shall be Barrs in an Action of Debt, as in *Baxters Case* here last adjudged, in an Action upon the Case for slanderous words, the Defendant pleads that he had justified the speaking of these words, at another time in another Action brought against him, and had a verdict and Judgement upon that, and so demands Judgement, and adjudged a good Plea, till the first Judgement is reversed, for Judgement is the saying of the Law, and 13. *Eliz. Dyer* 299. 34. in Debt for Costs recovered in a Writ of entry, the Defendant pleads that the Plaintiff hath sued an *Exigent*, which was Executed, and a good Bar in an Action of Debt, and so 1. and 2. *P. and M. Dyer* 207. 24. In Debt for Damages recovered in Assise, the Defendant pleads in Bar, that after the verdict given and before Judgement, the Plaintiff entered into the Land, and there no Judgement is given. But it seemes if the Plaintiff say of Course that the Common Law prescribes, that then he shall not have Execution, (for of those things which rightly are Acted, see there be Executions) but if the Defendant in the first Action had pleaded a release, and Judgement was given upon that against him, he cannot plead that againe, (for it runs into the thing Judged,) 14.



Ed. 3. in Debt against an Executor, and part of the assets found, the Plaintiff cannot have new *Scire Facias* without Averment that there are new assets, and 24. H. 6. Action with averment that there are assets, and Judgement good both waies, and presidents shewed of both Courts. And he intended that the Executor could not have helped himself by *Audita Querela*, unlesse he feares to be impleaded, but after Execution he cannot have Restitution, and so concluded and praied Judgement for the Defendant. Coke cheife Justice, that there cannot be a *Devastavit* in the Wife, unlesse that it be voluntary payment by her, for the Statute of 23. H. 8. gives present Execution of a Statute *Staple* without *Scire Facias*. So that the Wife had no time to plead the Judgement, and for that this involuntary Act, shall not be a *Discharge*, for she is no agent, but only a sufferer. And at the Common Law if the Plaintiff hath Judgement in an Action of Debt after the yeare he hath no remedy, but new Originall, and this mischief was remedied by the Statute of *Magna Charta*, which gives *Scire Facias* in place of new Action. But it seemes to him that the Barr in the *Scire Facias* shall retaine good Barr, till it be reversed, as in 2. Rich. 3. A man hath election to have action of *Detinue*, or action of *Trespasse*, and he brings his action of *Detinue*, and the Plaintiff wages his Law, and after brings an action of *Trespasse*, and the first Nonsuit pleaded in Barr, and adjudged a good Barr, 12. Ed. 4. accordingly: *Hester, Wilmesley, and Warburton*, agreed without any doubt, but they sayd, that if the first execution had been had by Covin, then it should have been otherwise.

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Debt by Executor.

Administrators during the minority of the Executor.

*Action upon  
the Case for  
words.*

seems that the Executor may sue special Scire facias upon the Record, and so sue execution in his owne name: See 27 H.8.7.a.

Action upon the Case for these words (*He hath stolne forty Stams of Lead* (meaning Lead in Stauce) from the Minster, and resolved by all, that action doth not lye, for it shall be intended that the Lead was parcell of the Minster, and the (*Innuendo*) shall not helpe that.

Pasche 9. Jacobi 1611. In Common Bench.

Crane against Colepit.

*Replevin, At-  
tornement of  
Tenant, being  
under age of  
21. yeares.*

**T** *Thomas Crane Plaintiff in Replevin against Bartholemew Colepit,* the only question was, if Tenant by discent of the age of twenty years and more, ought under one and twenty yeares to attorne to a Grant of the signiory or not, and it was adjudged that the Attornement is good for three reasons.

First, For that he gives no Interest, and for that it cannot be upon condition; For it is but a bare assent.

Secondly, His Ancestors held the same Land by the payment of the Rent and making of their Services, and it is reason that the Rent should be payd and the Services performed, and for that though that he shall have his age for the Land, yet for the Rent he shall not have his age, and though that it is agreed in 32 Ed. 3. That he shall have his age (*In per quæ servitia*) yet after his full age the Grantee shall distraine for all the arrearages due from the first, so that the Attornement is no prejudice for this Infant, and he is in the number of those which shall be compellable to attorne, see 41 Ed. 3. 23. 26 Ed. 3. 32. 32 Ed. 3. and 31 Ed. 3. *Per quæ servitia*, 9 Ed. 3. 38. 32 Ed. 3. Infant of the age of three years attorned, and good, and 3 Ed. 3. 42. Husband attornes, and that shall bind the Wife, 12 Ed. 4. 18 H. 6. Attornement of an Infant is good to binde him, for that it is a lawfull act.

Thirdly, The Attornement is a perfect thing, of which the Law requires the finishing, that is, the grant of the signiory which is not perfect, till the Tenant attorne, and *Foster Justice* said, that so it had been adjudged in this Court in the time of the Reigne of *Elizabeth*, in which Judgment all the Justices agreed with one voyce, without any contradiction, See 26. Ed. 3. 62.

*pasche*

*Pasch. 9. Jacobi, 1611. In the Common Bench.*

As yet *Rules against Mason*, see the beginning, *Michaelmas*  
8. Jacobi.

**D**Odridge Serjeant of the King argued for the Plaintiff, he saith that there are two Copies, first that a Copy-holder for life under a 100. l. may nominate his Successor. Secondly, That such Copy-holder after such nomination may cut down all the Trees growing upon his Copy-hold and sell them, and he saith that it hath been adjudged that the custome that Copy-holder for life may sell the Trees growing upon his Copy-hold is void, between *Popham and Hil, Hillary 45 Eliz. In this Court*, so if the first custome doth not make difference by the nomination, the second is resolved to be void, and it seemes to him that the first custome doth not make difference, and to the objection that the first custome hath been adjudged to be good between *Bale and Crab*, he saith that the custome adjudged, and this custome as it is found differs in many points. First, It was found that every Copy-holder for life solely seised without Remainder, but here is sole Tenant in possession, and this may be where there is a Remainder, so that uncertainty in this makes the custome void, as in *6 Ed. 3.* custome that an Infant at the age of discretion may alien is void for uncertainty, also in the case here it is found, that the Copy-holder may name who shall be next Tenant to the Lord, and doth not say to whom the nomination shall be made, but in the first case the custome is found to be, that the nomination ought to be to the Lord in the presence of two Copy-holders, also in the first it is found, that if they cannot agree of the Fine, that the Homage shall assess it, but in this custome here found there is not any mention of that he ought to seek to be admitted, and doth not say at what court, the which ought to be shewed in certain, as it is resolved in *Penmans Case, 5 Coke 84.* Where custome that a Feoffee ought to be inrolled, is expressed, shall be inrolled at the next court, also in the first case to be found that after the Fine is paid or offered, he which is named shall be admitted, and here is not any mention of that, so that he concluded that this is a new custome, and not the same custome which was in question between *Bayle and Colepit*, also it is found that the trees were cut immediately after nomination of a new Tenant, and before any admittance or Fine paid for him, so that inasmuch that the Benefit was not equal as well as to the Lord as to the Tenant, so in *3 Ed. 4. 28* and *23 Ed. 4. 80.* For growing and turning upon the Land by another, for that the custome shall be void. And so the second custome also it seems.



seems, that that is voyd and unreasonable. First, for that when any is alledged in the custome, that is inconvenient, though that it be not mischeivous, yet the custome shall be void, as in 4. *Affirm* 27. in *Affs* brought against an Abbot, which pleads custome, that all the houses of the South side of the street shall be devisable, and he claimes by force of a Devise made according to that custome and adjudged that the custome is not good, for it is inconvenient, that in one self same ancient Town one house shall be devisable and another not, and upon that the Plea was amended, so here; custome that a Copy-holder may sell all the Trees is inconvenient, for it doth not appeare that this Custome extended to any other but to him: Secondly this Custome is against the Common Wealth, for every Custome ought to have preservation and maintenance, and that shall not be here, for when one Copy-holder hath sold all the Trees, the Successor shall not have any Boots nor Fire, and so by the same reason he may pull down the house. And so this tends to destruction, and rests in the will of a man if he will destroy or no. And this is inconvenient that such power should be given to one, which hath but an estate for life, as in 24. *Ed.* 3. *Barr* 277. Copy-holder pleads Custome of a Mannor, that that Copy-holder which comes first after a windfallaine, shall have it, and resolved to be void Custome, for that it rests in the will of a man if he will make that or not. So in 5. *H.* 7. 9. Custome that if one find Beasts doing Damage that he may distraine them, and have foure pence for his Damages, and adjudged void Custome, for the Damages are uncertaine, and for that it is no reason that the Fine shall be certain, and 19. *Eliz.* *Dyer* 378. 48. Custome that all Devises and Leases granted for more then six yeares are merely void forthwith, is a void Custome, because contrary to common reason, and the liberty of one which hath Fee Simple. So 2. *Hon.* 4. 24. Custome that the Tenants of the Mannor shall not use their Common till the Lord put in his Beasts, is void, for it should not depend on the Will of the Lord; So in the principall case the Lord cannot grant Copyhold Estate in reversion, for it depends upon the Nomination of his Tenant, and for that the Custome shall be void.

Thirdly, The Copy-holder hath prescribed to do a thing which is contrary to his Estate, and doth not cohere with his Estate, that is, that Lessee for life shall cut the Trees, for he hath but a special property in that, and not the absolute property, and it is like to a Case in 19. *Ed.* 3. *Fessments* 68. and 29. *Affs* 9. Where Commanden of an Hospitall prescribes, that he and his Predecessors, which have had the same office have used to make Leases for lives, and in an Action brought by the Prior it was adjudged that the custome is void, and so by consequence the Lease was void, for the Comman-

her hath no Estate to make it; so in *Furse and Hemlings Case*, 4. *Ed. 3. F. Dat.* Custome that a married Wife may make a Will is void, for it doth not stand with the quality of her person, so here it is not with the quality of the Estate; but it may be objected that it is a greater Estate; then an Estate for life; for it is perpetual Freehold; so that it may be answered in this case, it is no greater Estate then for life, for the Copy-holder hath only made nomination; but he which was nominated was not admitted, so that the Tenant hath no greater Estate; nor the Lord hath granted greater Estate then for life; but admit that he be Tenant for life, with a Remainder for life to him to whom the nomination is made, yet he cannot do such an Act; and for that the cutting down of the Trees shall be a forfeiture of his Estate by custome, by which the Estate is created, and copy-held Lands are not as other Lands, which if they were let for life at the common Law, the Tenant were discontinuable for waste; till the *Statute of Gloucester*, for it was the Folly of the Lord to make a lease to such a person, which would make waste; and for that, as the benefit and Priviledge of the copy-holder remains; so the benefit of the Lord shall not be abridged, and so he prayed Judgment for the Plaintiff.

*Hampden Serjeant* saith the contrary for the Defendant, and he agreed that Customes ought to be reasonable; and if they be generally unreasonable, they cannot be reasonable; and to the first exception, to prove that it is a new Custome; that is, that it is found that he is only Tenant in possession, without saying, Without Remainder, as it was in the first Case; so that he thought if it were true, that the Copy-holder hath such priviledge that he might nominate his Successor, it is not material; and to the lessening of the Fine, that is found very certain; for he that is nominated at the first requires admittance, and if the Lord refuse that he shall be admitted, for such a Fine that the Mortgage Assess; and so it is found; and that is very certain; and the rather for that, that this is a special Verdict.

Also he agreed as before, That Custome ought to be reasonable; and if it be generally inconvenient; though it be not mischievous, yet it shall not be good; and to the Case of 40 *Ass. 37.* Custome to devise the Tenement on the South side of the Street, is not good, for the, that Custome cannot be in one particular place certain; and also he agreed the Case of *Windfall*, for the tithes tithed to charge the Lord; 3 *Ed. 3. Ditz. 59. 57. 58.* Custome to have Herriot the best Beest, and if that be put out of the way before seizure, then the Lord may seize and take the Beest of any other man there arising and lying downe, to his owne proper use; and the custome held void and unreasonable; so the custome in 20 *H. 7.* to have so much for

for every Pound-breach is voyd; but this custome is merely between the Lord and Tenant, and the custome hath made that descendible Inheritance, and also may have reasonable beginning, and the Lord hath benefit for that; that is, his fine for the admittance of him which is nominated; and custome hath created other Estates, as Grants to him and his, is good by the custome, and so the Cases of 21 Ed. 4. and 22 Ed. 4. before cyted, for the turning of Plough upon the Land of his Neighbour: So the custome if the Lord feed the Beasts of his Tenant that he may Fold them; and so he concluded that the first custome to make nomination is good; and to the second custome, he agreed that bare Copy-holder for life, could not Prescribe to cut and sell all the Trees, no more then custome the Tenant for life may devise, as 35 H. 6. But here the Tenant hath perpetuity in his Estate, and may nominate his Successor, and as well as the Common Law allows Tenant after possibility of Issue extinct, to make waste, so may custome allow Tenant for life with such nomination, power to cut and sell the Trees: Also he intended, admitting the custome not good, that yet the Copy-holder hath not forfeited his Estate, for the Trees and the Mannor are granted by severall Grants, and for that, though that they are by one selfe same Deed, yet by that the Trees are severed from the Mannor, and the Trees are the cause of the forfeiture, and they are no parcel of the Mannor, as in 31 Edw. 3. Affis. 441. by sale of a Castle the service are extinct.

So here the forfeiture cannot accrue to the Mannor, when that cometh by reason of Trees, which are severed by reason of severall Grants; and he thought that the Grant shall be taken more strong, against him which made it; as if a man in the Premises give Fee-simple, to have in tayl, the Estate tayl shall be precedent, and the Fee simple depending upon that; so if a man have the next avoydance of a Church, and the Church becomes voyd. and after he purchase the Advowson, yet the Presentation remaines as it was before, for that is the best thing, and so it is resolved in *Herlackendens Case*, 4 Coke 63. b. That if a man makes a Lease for yeares of Land, except the Trees, and after grants the Trees to the Lessee, that the Trees are not reunited to the Land, and so he concluded that it shall be no forfeiture, and prayed Judgment for the Defendant; and this Case was argued againe, *Michaelmas*, 9 Jacobi, by *Shirley* for the Plaintiff, that the first custome was voyd, insomuch that he claimed to doe a greater thing then his Estate would warrant, as in 35 H. 6. Custome that if one Pawne the Goods of another, that he which hath them Powned may keep them whosoever they were, is not good, as Custome that the Tenant in tayle may devise, is voyd, for his Estate will not warrant it, and it is prejudice to the Tenant in reversion:

*Shirley.*



version: So Custome that Copy-holder shall have Common, and another Custome, that none shall put in his Beasts till the Lord put in his, 2. H. 4. 24. Also there is no Fine Limited to be tendered by the Tenant, or to be demanded by the Lord: And if a Copy-holder refuse to pay his Fine it is a Forfeiture, and if the Custome do not provide for the Fine of the Lord as for the Copy-holder, the Custome shall be void: Also here cannot be admittance, for *Luttrell* saith, that the sole meanes to transfer Copy-hold is by Surrender. And here if the Custome should be good, the copy-hold should be transferred by Nomination only, and so the Lord should be Defeated of his Fine, and it seemes also that the second Custome is void, for it is contrary to the Estate of a copy-holder, to sell all the Trees, but he agreed that he might have Estovers for houseboote and hedgeboote, as it was adjudged in *Swayne and Beckers Case*, and he cited the 19. assise. Where a Commoner made a Lease for life, and void, for that that the Estate would not support it, 9. H. 6. 56. and 11. H. 6. 40. Prescription to sell Estovers is void, for Estovers are appropriate to a house. And also it was adjudged in this Court between *Putrills* and *Powell*, that a copy-holder for life cannot prescribe to sell the Trees, for it is contrary to his Estate, as if a Custome be, that if a Feoffor die his Heire within age, that he shall be in Ward, as 8. H. 6. And he thought that the Nomination was no alteration, for he to whom the Nomination is made, hath only an Estate for life, when the Nomination is made, and that doth not warrant the sale of the Trees, and to the third it seemes that the Lord of the Mannor bargaine and sells the Trees, and after lets the Mannor to the bargaine for years, and then copy-holder makes waste, he thought that the Trees were not severed from the Mannor, as in 35. H. 8. 48. *Dye* 1. if a man bargaine and sell a Mannor, and after in the same Deed makes a bargaine and sale of an Advowson appendant, this remains appendant: So if a man bargaine and sell a Mannor, and also the Trees do not passe till Livery be made of the Mannor, so if Lessee for yeres, gives and grants the Land, and makes a Letter of Attorney to make Livery, the reame passes without Livery, and then it is a Forfeiture: And here the Lessee shall have the benefit of Shade and Burrough, and the Trees themselves during the Terme, as parcell of the Land, and then when the copy-holder hath done more then his Estate will warrant, this is a forfeiture, and the Lessee shall take the advantage of it, and so he praied Judgement for the Plaintiff: *Harris* for the Defendant that the Customes are good, but admitting that so, yet the Plaintiff shall not take advantage of it, and he argued that Custome ought to have two properties, first reasonable, secondly ought to have time to make

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that

*Harris.*

that perfect, and then shall be good, as it appears by the examples of  
*Litton* 37. of *Burrough* *English* and *Cavelkind*, and custome may  
be against common right, but not against common reason, which is the  
common Law, 8 *Ed.* 4. 18. 41 *Ed.* 3. 4. And he intended here that the  
second custome is good, if the first be good, for then it is perpetual  
Freehold, and Copyhold Estate of Inheritance is but an Estate at  
will at the Common Law, and yet such Copyholder may dispose  
the Trees, as well as custome may treat the Estate, as well may  
it give such privilege, as custome may warrant the taking of Toll  
for passing over the soile of another, 22 *Ass.* 38. And so custome  
have the Foldage of the Beasts which feeds upon his soile is good, but  
custome for paying the Goods of another is not good, for there is  
not any recompense, but sitting in the Stradd to dig the soile at  
joyning for landing of his Nets is good, for this is for the publick  
good, 8 *Ed.* 4. 23. So the custome for turning upon head-land of an-  
other is good, and is for the preservation of Tilling, and also it is be-  
tween Lord and Tenant, and shall be intended to have a reasonable  
beginning for consideration, &c. That this continues, for he had  
Fines and other Services, and yet 3 *Ed.* 2. 30. *Dyer*. If the Lord thin  
Harriot of his Tenants, and if it be Esloyned, alledge custome, that  
he may take the Beasts that he found upon the Land in *Wiltshire*,  
and this was a judged unreasonable custome, 30 *Hi.* 7. 13. Custome  
to have three shillings of a stranger for pound breach is void; but  
a Tenant is otherwise, for it shall be intended to be a lawfull beg-  
inning, 1 *Hi.* 7. 40. So here the beginning shall be intended to be lawfull  
and for valuable consideration, and for this it shall be good; and to  
the second custome it follows by consequence to be a good custome,  
if the first should be good, and then to the third he agreed that Co-  
pyholder cannot make waste, and if he do shall be a forfeiture of his  
Estate, as it is said by *Hud.* 9 *Hi.* 40. *West.* 99. *h.* this ought to be  
Wast that is prejudiciall to the Inheritance, as it is agreed in *Ho-*  
*lackendun* case, 14 *Cot.* Where it is agreed that the Bargainees had  
severall Interests in the Land and in the Trees, and by the Writing  
by the making of the Lease of the Manner they are not retained and  
annexed to the Freehold again, and then the cutting and selling is  
no prejudice to him in reversion, and so no Waste to make forfeiture,  
and so he concluded, and prayed Judgment for the Defendant, and  
is adjourned, for the beginning, *fol.* 101. *Trinity*

Trinity 9. Jacobi 1611. In the Common Bench.

As yet Doctor Hussey's Case, see Hillary 8. Jacobi.

**I**n the Writ of *Revivement of Ward*, between Francis Moore Esquire Plaintiff, against Doctor Hussey and Katharine his Wife, Robert Wakeman Clark, and many other Defendants, Dodridge the Kings Serjeant argued for the Defendant Doctor Hussey, that a married Wife is not within the *Statute of Westminster 2. chapter 35.* By which the Writ of *Revivement of Ward* is given, that which before the *Statute* was only Trespasse, is by the *Statute* altered in manner and form of proceedings and in penalty of Judgment, and he thought that this Writ being formed upon the *Statute* doth not extend to a married Wife, for by the *Statute* if the Defendant, cannot satisfy for the marriage he must abjure the Realm, or shall have perpetual Imprisonment, which goes near to every man next unto his Life, the love of his Country and liberty, and those the makers of the *Statute* did not intend against a married Wife, and he grounded his argument upon these words of the *Statute*, by which it appears that the makers of the *Statute*, did not intend any person which had no property in any Goods nor power to make satisfaction.

For first the *Statute* provides, that if he be able to make satisfaction, that then he should satisfy, if not that then he shall abjure the Realm, by which it appears that the *Statute* intends those that have property, and by possibility may satisfy, but a woman cannot, for her marriage is a gift of all her goods personall to her Husband, see for that *Pate and Gresham's Case* Commentaries.

Secondly, The *Statute* provides new form of proceedings, for if the Ward or any of the parties dy leaving the Writ, the Writ shall not abate, but it shall be revived by Restitutions, by or against the Executors of him that is dead, by this it appears that he which hath no power to make Executors, shall not be intended to be within the *Statute*, and a married Wife cannot make a Will, and by consequence cannot make Executors, see *Coke 6. in Forst and Hamblin's case*, 3 Ed. 3. *Devise* 13. 4 H. 6. 6. and if the Executors have no assets, then the *Statute* gives remedy against the Heir.

Thirdly, The *Statute* intends to give action against him which may have possession of the ward, the which a married Wife cannot have, for her possession is to the use of the Husband, and by the words of the *Statute*, he against whom the Action is given ought to be made *Fidei possessor*, and to the objection, that though that the Wife married cannot by any possibility have sufficient to make satisfac-



faction according to the intent of the *Statute*, yet if the Husband hath sufficient, he shall answer for his Wife, as in 48 *Ed.* 3. 26. and 17 *H.* 6. A married wife shall be attached by the Goods of the Husband, he saith that there the reason is, that the Wife is answerable by the Husband, but this is only to make him to appear, but he against whom the action is given, by this *statute* ought to have property, and in such cases a married Wife shall not be punished, as in the same Parliament *Westminster* 2. chapter 25. Is provided, that if a Disseisor faile of Record that he shall be imprisoned, in *Affise*, for this is the speedy remedy, but if a married wife pleads a Record and failes of that to the Jury; she shall not be imprisoned, though that the *Affise* was brought against the Husband and the Wife or against the Husband, and the wife is received, see 1. 3 *Aff.* 1 44 *af.* 17. *af.* 19. 11 *H.* 4.

Also the *Statute of Conjunctim Feoffati*, fol. 99. Which was made in the time of the said King *Ed.* 3. in which time the *statute of Westminster* 2. was made, and is contemporary with the same *statute*, by which it is provided, that if any plead Joyntenantcy, which is found against him in the *Affise*, that he shall be imprisoned by the space of a yeare, and 16 *Affise* 8. Husband pleads Joyntenantcy with his wife, and maineines the Exception which is found against them, and resolved that the Wife should not be imprisoned by this *statute*, 21 *Affise* 28. 31 *Affise* a. accordingly, and he said there was not any president nor Book of Record, by which it appears that a Writ of *Repossession* of Ward, was maintained against a married Wife, for *Repossession* after the Coverture, but for *Repossession* before the Coverture, see 6 and 8. *Ed.* 3. and to the Objection that the Plaintiff hath election if he will have the sufficiency come in question, may but admit the Defendants to be sufficient, and then the imprisonment, nor the abjuration shall not be inflicted, as it seems to be some opinion; 8 *Ed.* 3. 52. and to that he saith, that the admittance of the parties cannot alter the Law, for if it were not the intent of the makers of the *Statute* that this should extend to the Wife, the admittance of the parties will not make that extend over the provision that, also it seems to him that the Verdict is not perfect, for altho it is not found by whom the Wyrd was married, but only that he appeared married, and it ought to be without the consent of the Plaintiff, and for that it might be that he was married by the Plaintiff, and then there is no cause of action, nor to have the value of the marriage, and it appears by 22 *E.* 2. *Damages* 130. that they ought to inquire by whom he is married, and also the value of the marriage, and if it doth not appear whether he be married or not, then the Verdict shall be conditionall and the Judgment also, and altho Presidents are, he appears married without the assent of the Plaintiff, and

and so he concluded, and prayed that the Judgment might stand: *Harris* Serjeant for the Plaintiff prays Judgment; and he supposed that it is in the choyce of the Plaintiff what Judgment he would have, for he ought to have Damages and the value of the marriage, and it remains in the discretion of the Plaintiff, what judgment he will have (that is) upon the Statute, for to have the corporall punishment, or allow the Defendants to be sufficient, and so to have judgment for the Damages, and the value of the Marriage, without any Imprisonment or Abjuration; as in 29 Ed. 3. 24. and 8 Ed. 3. 52. where the question was demanded of the Plaintiff, and in 22 Rich. 2. Damages 130. *Hankford* demanded the question, if the Jury ought to inquire if the Defendants were sufficient or not, and it was resolved that they need not; and in 34 H. 8. Trinity, Rot. 347. there is a President accordingly, where the Husband and the Wife were found guilty; and the Action was founded upon the Statute, and *Capias* awarded against them both, and to the sayling of the Record, it is reason that the Wife should not be imprisoned, for the Pleas are the Pleas of the Husband and his acts, and in the 11 H. 4. 51. and 21 Affis. 4. in Affise the Wife was received, and voucheth a Record, and failed, and no judgment upon that against the Husband, and the Wife was imprisoned; and so upon Allegation of Joyntenancy, the Wife was imprisoned; and so he concluded, and prayed judgment for the Plaintiff; and at another day the Case was argued againe by *Montague* the Kings Serjeant for the Defendant, that a married Wife was not within the Statute of Westminster 2. Chap. 35. And he sayd, that the true course for understanding the Statute, is to consider three things:

First the Common Law before the making of that Statute:

Secondly the mischeife that the Statute intended to remedy:

Thirdly against what persons the Statute intended to remedy such mischeifes: And to the first he intended that, at the Common Law, before the making of the Statute, the Remedy for Ravishment of Ward, was an Action of Trespasse, as it appears by *Fitz. Na. Bre.* And then it was questioned if the Plaintiff should recover the Body without Damages, or Damages only without the Body. See 9. Ed. 4. 48. Ed. 3. 20. 27. H. 6. And then there was no greater punishment, nor other remedy for the taking of the Ward, then of other goods; and for the remedy of that, the Statute of Westminster 2. chap. 35. was made; by which it is provided, that if the Ravisher restore the Ward unmarried, then the Plaintiff shall recover only Damages for the Ravishment, and not the value of the Ward: But if the Ward be married, then the Guardian shall recover the value of the marriage, and if he shall not satisfie, then he shall abjure the Kingdome, or have perpetuall Imprisonment.

and

*Harris.*

*Montague.*

and the punishments inflicted by the Statute, being so penal. Then the persons which are within the Statute are considerable, for in all penall Lawes, the persons and the penallities are the things to be considered, and to the persons this Statute saith, that one for anothers Faulk is not to be punished, and he said, this is referred to Damgages, as well as to Imprisonment, and it is not a lost case, and the Plaintiff without remedy for Action of Trespass lies against the Husband at the Common Law, for, for all Trespases at the Common Law done by a married Wife, the Husband shall be punished by payment of the Damgages and costs which are recovered: See 14 H. 8. and 9. Ed. 4. But to the Statutes which are penall and inflict corporall punishment there otherwise, and as the Statute of 23 Eliz. made against Recusants for not resorting to Church, should forfeit twenty pounds for every moneth, and resolved that this shall extend to a married Wife, and for that the Husband shall be lyable to action: But by the third of Jacobi, there is speciall provision, that the Woman shall not be subject to twenty pounds a moneth, but other punishment provided for her; and he supposed that where a statute gives Imprisonment and Damages, and a married Wife offends the statute, and shall be imprisoned, but the Husband shall not pay the Damages, as in 8 H. 8. 11. Upon the Statute of Westminster, a Woman was Imprisoned for false appeale, for the death of her Husband, who was brought into the Court and living; and in the 11 H. 4. 54. It is marvell that the Statute of Westminster 2. gives the action to the Heire, inasmuch the Interest appears to the Executor: And for that Hill saith, That the Statute was not made by those which were skilled in the Law, but he spake ill, saith the Reporter: Also the words of the Statute, If the Ravisher cannot satisfie, he shall abjure the Realme, or have perpetuall Imprisonment, and the Wife cannot, by any possibility, make satisfaction, for she cannot have any Goods; so as this Case is, the Statute would make perpetuall separation, either by abjuration or perpetuall Imprisonment, if this shall extend to a married Wife, as in 6 H. 7. was the question, whether a married Wife shall be Attached for that, and she had no Goods, as it is 48 Ed. 3. 2. the Sheriff returnes (*Nihil*) against a Monk, for that that he had no Goods, for all his Goods are the Goods of the Abbot, and it is impossible that a married Wife should have any Goods, and the Law doth not compell to impossible things: See 3 Ed. 4. 4 H. 6. Also the Statute saith, That if the Ravisher dye, hanging the Writ, let the Law proceed against his Executors by resummons, and a married Woman cannot make Executors; and to the like cases, be thought that a married Wife was not within the Statute of Offenders in Parks, and this gives the same punishment that the Statute gives,



gives, as it is resolved, 13 *Assf.* So if a married Wife sayle of a Record in *Assise*, she shall not be imprisoned, and the Husband is joyned onely for conformity, and for no other cause; and to the President of 34 H. 5. which hath been cyted here against the Husband and Wife, and Judgement by default against both, and upon this, *Capiatur* is awarded against them both, but this is onely for the Imprisonment but not for the Damages; and also this Case differs from that, for here the Husband is found Not guilty: Also it seems that the Book of Entrys, 366. 15. lyes against Husband and Wife, and there they both plead, but if the Wife onely be condemned, the Husband shall not pay the Damages recovered against her, 40 Ed. 3. 25. As a Lease is made to the Husband and Wife, the Husband makes waste, and an Action of waste is brought against them both, and the Husband dyes, and the Writ abates, for the wrong dyes with him, and the Wife shall not be punished; and so prayed that the judgment might stay, and Doctor Huffsay not punished.

Hutton Serjeant for the *Plaintiff* prayed that the Judgment might be entred, and first hee considered the Common Law, and after that the *Statute*, and all the Common Law hee agreed that a Trespasse lyes against the Husband and the Wife, for Ravishment made by the Wife, and in this hee should recover Damages against the Husband and the Wife, and the Husband shall be charged with the Damages, though it be but for words proceeding from her tongue, or any other Trespasse, and if the Husband make default, his body shall be imprisoned, so that it appears that there was remedy at the common Law by action of trespassse, and that the Husband was subject to that, then by consequence it was intended, that all persons which were chargeable by the common Law shall be chargeable by the *Statute*, and by the action which is formed upon that, and by the common Law the Husband was chargeable, and by consequence shall be chargeable by the *Statute*; and he intends that there would be difference between actual wrongs, and others which are come by omission, and if the Wife be the person which did the wrong, then she shall be punished as well by *Statute*, as she was before by the common Law, also she shall be out-lawed, and it hath been agreed that *Ravishment of Ward* shall be maintainable against the Husband and the wife, if they both are Ravishers, and also if the wife be Ravisher before marriage, and after takes a Husband, the Husband shall be charged with the damages, and his Body shall be imprisoned, and by consequence shall be abjured, also shee may make an Executor by the consent of her Husband, but admitting that she could not, then the remedy is given against the Heir, and she shall be within this *Statute* as well as other *Statutes* made in the time of the said King, as the

Hutton.

the Statute of Westminster 1. 37. And shall be a Disseisor with force, and shall be imprisoned, whether the Husband joyn with her or not, as it is adjudged 16 Affise 7. for all Statutes which provide for adultery, all wrong, a married VVife shall be intended within them, as it is 9 H. 4. 6. But the pleading of Joyntenancy, there the Plea is the act of the Husband, and so sayling of Record, upon the Statute of 34 Ed. 3. as it is 16 Affise 8. for the Husband propounds the exception, but if the VVife propounds the exception, then she shall be within the Statute and shall be imprisoned, 21 Affise: So if a married VVife make actuall disseisin with force she shall be imprisoned, 9 H. 4. 7. b. 8 Ed. 3. 52. 22 Ed. 2 Damages 20. 27 H. 6. Ward 118. And so the President, Trinity 33 H. 8. Rot. 347. in a case between Thomas Earle of Rutland against Lawrence Savage and his VVife in Recognition of Ward, at the Nisi prius the Defendants make default, and the Judgment was, that the Husband and the VVife should be taken, and upon that he inferred, that the Husband should be subject and charged with the damages, and so it is taken upon the Statute of 35. Eliz. That the Husband shall be charged with Debt for the Recusancy of the VVife, and shall be imprisoned for the not payment of it, as to the verdict it seems that this is good, and it shall be intended the VVard was married by the Defendants, as in 33 Ed. 3. Verdict 48. It is found by verdict, that Muller enters, and resolved that this shall be intended in the life of the Bastard, or otherwise it is nothing worth, and in Fulwoods case 4 Coke, the Jury found that the Defendant acknowledged himself to be bound, and that shall be intended according to the Statute of 23 H. 8. and so here though that it be not found, that the VVard was married by these Defendants, yet it shall be so intended, notwithstanding that nothing is found, but only that he appeared married, and so he concluded and prayed Judgment for the Plaintiff. This case was solemnly argued this Terme by all the Justices, that is, Coke and Walmesley, Warberton and Foster, and upon their solemn arguments, Coke and Walmesley were of opinion that a married wife is not within the Statute, and Warberton and Foster were of the contrary opinion, and so by reason of their contrariety in opinion, the Judgment was staid.

Trinity 9. Jacobi 1611. in the Common Bench.

Burnham against Bayne.

THE case was, A Man seised of divers Lands, the halfe of them were extended by Elegit, and before Judgement was had against him, a new Elegit Awarded, and if all the halfe which remains

remains, or but the halfe of that which was the fourth part of all should be extended was the question: And it was agreed by all the Justices, that but the halfe of that which remains, and not the halfe of all, which he had at the time of the Judgement: But the halfe of that, which he had at the time of the *Elegit*: And if all which remains be extended, the Extent shall be void, by all the Justices, see 10. *Ed. 2.* Execution 137. 16. *H. 2.* Execution 118. And here the principall case was, A man hath a Rent of forty pound, reserved upon a Lease for years, and two Judgments in Debt were had against him at the Suit of Sir *Thomas Cambell*, and three Judgments at the Suit of the Plaintiff, the halfe was first extended by *Elegit*, upon the first Judgment had, at the Suit of Sir *Thomas Cambell*, and after upon the Judgment had at his Suit, the halfe of the residue was extended and after upon the Judgment at the Suit of the Plaintiff all the residue was extended, and all the Justices agreed that the Extent was void, for they ought to extend but the halfe of that which remains, and that was but the fourth part.

Trinity 9. Jacobi 1611. In the Common Bench.

### Trobervill against Brent.

THE Case was, A man makes a Lease for yeares rendring Rent, and after grants the Reversion for life, to which Grant the Lessee for yeares attornes, the Grantee acknowledgeth a Statute, and after surrenders his Estate, the Comtee extends the Statute and distraines for the Rent, and in *Replevin* avowes for the cause aforesaid, and adjudged that the Arowry was good.

Surrender after  
Statute acknowledged.

Agreed that Creditor may sue the Executors, and the Heir of the Debtor also, but he shall have but one Execution with satisfaction, see the Statute of 23 *H. 8.* for such course in the Exchequer.

Executors sued  
and also the  
Heir.

Note, that no Court of Equity, may examine any matter of Equity, after Judgment which was preceident the Judgment, see the Statute of 4 *H. 4.* chap. 23.

Court of Equity.

Trinity 9. Jacobi 1611. In the Common Bench.

### Hamond against Jethro.

THE case was this, *Edward Hamond* was Plaintiff in Debt upon a Bill against *William Jethro*, and the Bill was made in this manner, Memorandum, that I *William Jethro* do owe and am indebted

Debt upon a  
Bill.

ted



Harris.

Sturley.

ted unto *Edward Hamond* in the Sum of ten pound, for the payment whereof, I binde my self, &c. In witnesse, and after the (in witnesse) it was thus subscribed, *Memorandum*, that the said *William Jethro* be not compelled to pay the said ten pound untill he recover thirty pound upon an obligation against *A. B. &c.* And in the Count was no mention made of this Subscription; but this appears when the Defendant prays, hearing of the Bill, the which was then entered *Verbatim* of Record, and upon that the Defendant demurred in Law. *Harris* Serjeant for the Plaintiff agreed, that if it had been in the Body of the Bill, it ought to have been contained in the Count to enable the Plaintiff to his action, but that which is after (in witnesse) is no part of the Bill, and for that it need not to be contained in the Count, 3 H. 6. 15, 16. A thing which doth not intitle the Plaintiff to action, need not to be contained in the Count, 36 H. 6. 6. If the condition, be indorced or subscribed, it need not to be contained in the Count; but if it be contained before the (in witnesse) then it ought to be contained in the Count, 21 Ed. 4. 36. If a man be bound to pay ten pounds when the Obligee carries two hundred load of Hay to his House, there the condition is precedent, and it ought to be contained in the Count, 22 Ed. 4. 42. accordingly: so here the matter is subsequent to the (in witnesse,) and there is not any other matter upon which the action is founded, nor contained in the body of the Bill, nor to be performed by the Obligee, and for that he prayed Judgment for the Plaintiff, *Sturley* Serjeant for the Defendant, that the sealing is immediately after the Proviso, and is adjoyning to the Bill in writing, and for that be it to be performed of the part of the Plaintiff or Defendant, it ought to be mentioned in the Count, for this intitles the Plaintiff to his Action of the case in 36 H. 6. 6. It is a condition subsequent, and there need not to be shewed; but if the condition be precedent, and contained in the writing before the intreating there, it ought to be mentioned in the Count: and in this principall case, this is either a condition Precedent or nothing, for it is, that he shall not be compelled to pay the said ten pounds untill he had recovered thirty pound, and if he never recover, he never shall pay the ten pound; and it is a condition of the part of the Defendant, and it is adjudged in *Uffards* case, that where a condition is precedent, there it ought to be contained in the Count, but where it is subsequent, otherwise it is. So 15 H. 7. 1. Grant, that when the Grantor is promoted to a Benefice that he ought to give to the Grantee ten pound, this is precedent, but in the principall case it is a Condition or Covenant: and though that it be subsequent, yet it may stay the Suit as well as an acquittance, which is to be an acquittance if he be vexed, otherwise not, but a condition that he shall not sue the Bill is void, for it is contra-

ry to that, and bars him of all the fruit of that, and precedent condition may be placed after the ( in Witnesse ) as well as before, so he prayed Judgment for the *Defendant*: *Coke* cheife Justice said, that this which is after ( in witnesse ) is not part of the Deed, but may be a Condition or Defeasance; but if it be not ( in witnesse ) in the Deed, then it shall be parcell of the Bill; but though that this be put after the ( in witnesse ) yet it shall have his force as Defeasance, but it need not to be contained in the Count; for in Bonds and personall things, there need not such strict words as in other Deeds, and for that this shall be a good Condition or Defeasance; but then the *Defendant* ought to have that so pleaded, and not demurr, for this makes the Bill conditionall. *Vvarberton and Foster* agreed, *Valmesley* did not gainsay it, and for that it was adjudged for the *Plaintiff*, if the *Defendant* did not shew cause to the contrary, by such a day, which was not done.

Note, It was adjudged by all the Justices, that fealty gives seisin of all annuall services sufficient to make seisin in avowry, but not in *Affise*, but of accidentall services, this gives seisin in *Affise*, and a man cannot take excessive distresse for that, for this is more sacred service, as *Littleton* saith of Homage, the most honourable: See 42 *Ed. 3. 26. 11 H. 4. 2.*

Note, Two retain an Attorney, both dye, the Executor or Administrator of the survivor shall be onely charged, and not the Executors of them both, for a personall contract survives of both parties, otherwise of reall contracts, as warranty: See 16 *H. 7. 13. 14. 3 Coke*, Sir *William Harbort's* Case, 30 *Ed. 3. 40. 17 Ed. 3. 8.* The Attorney brought an Action of Debt against both, and the Executors of both the parties, which retained him for his Fees, and both pleaded jointly, that they detained nothing, and it was found for the Plaintiff, and upon motion in arrest of Judgement, the Judgement was stayed, inasmuch that the Executor of the survivor was onely chargeable, notwithstanding the pleading and admission of the Parties.

Note, That it was agreed by all the Justices, that by the Law of Merchants, if two Merchants joyne in Trade, that of the increase of that, if one dye, the other shall not have the benefit by survivor: See *Fitzherbert's Natura brevium, Accompt*, 38 *Ed. 3.* And so of two Joyned Shop-keepers, for they are Merchants; for as *Coke* saith, there are four sorts of Merchants; that is, Merchant Adventurers, Merchant Merchants, Merchants travelling, and Merchants residents, and amongst them all there shall be no benefit by survivor.

*Inter accrescendi inter ceteros heredes locum non habet.*

Note, That Arbitrators awarded, that every of the parties should

Fealty gives  
Seisin of all annuall Services.

Attorney brings  
Action of Debt  
for Fees.

Survivor doth  
not hold a-  
mongst Mer-  
chants to have  
the benefit  
by survivor.

Award void.

pay onely five shillings for writing the award to the Clark, and agreed that the award was voyd to that part, and good for the residue, for they cannot award a thing to be made to a stranger.

Action upon the Case for words.

Action upon the Case was brought for these words, He is a Cozening Rogue, and hath cozened Richard Wood of thirty pound, and goeth about to doe the like by me, and agreed that the action doth not lye: So for Rogue or Cozener, for it is without aspersion and gentle, and words shall be taken in the gentlest sense.

Devise that Executors shall sell Land.

Devise that Executors shall sell Land with the assent of J. S. if J. S. dyrs before that he assents, the Executors shall not sell; notwithstanding the death of J. S. was the act of God, and in the life time of J. S. they could not sell without his consent, and so it was agreed in the Case concerning Salisbury Schoole, where the under Schoole-Master was to be placed by the head Schoole-Master with the assent of two cheife Bailiffs, and it seems the head Schoole-Master cannot place without their consents.

A Towne incorporated with the consent of the greater part.

Note, it was said to be adjudged that the Inhabitants of a Town cannot be incorporated, without the consent of the major part of them, and incorporation without their consent is void.

Action on the Case for slander.

In action upon the case, the case was this, The Brother of the Defendant spoke these words to the Plaintiff, that is, Thou Thief, thou Goale whelpe, thou hast stolne a peice of Silver from my Master Hacken; and the Defendant sayd as insued, that is, That which my Brother spake is true, I will justifie it, and spend a hundred pounds in proofe thereof; and it seems to the Court, that the Action doth not lye against the Defendant, insomuch that it doth not appere by the Court, that he had notice of the words which his Brother spake; but that this ought to be specially averred, and the Court contained that the Defendant justified the aforesayd scandalous words to be true, as in these English words following, That which my Brother, &c. and it seemes that this was not sufficient.

To the Honorable the Judges of the Common Bench.

Sir Richard Buckley against Owen Wood.

Action upon the Case for saying one in a Court which hath no Jurisdiction.

Note. It was sayd to be adjudged between these parties, that if a man exhibits a Bill in the Star Chamber, which contains diverse slanderous matters, whereof the Court hath no Jurisdiction, that an Action upon the Case lyeth; so if the Plaintiff affirme his Bill to be true, action upon the Case lyeth upon that, as it was adjudged upon that, as it was adjudged in the same Case.

Michaelmas



*Michaelmas 9. Jacobi 1611, in the Common Bench.*

*Patrick against Lowre.*

**I**N Trespasse the *Defendant* justifies, for that, that he was seised of a House with the Appurtenances; and prescribes to have Common in the place, &c. for all manner of Beasts, *Levant & Couchant* upon the sayd House, and good prescription, notwithstanding it doth not containe certaine number, and it shall be intended for so many of the Beasts, which may be rising and lying down upon the said House, and if he put in more they may be distrayned, doing Damage; and so is the usage and prescription in all Burroughs; that is, to prescribe to have the Common by reason of the House, but the matter upon which *Nicholls* the Serjeant when moved it insists was the uncertainty, that is, what shall be sayd rising and lying down upon a House, for he thought beasts could not be rising and lying down upon a House, unlesse that they are upon the top of the House, but to that it was resolved, that insomuch that here the common was claymed to the House, it shall be intended that it was a curtilage belonging to the House, and if it be not, that ought to be averred of the other party, and then the Beasts shall be intended to be rising and lying upon the Curtilage, and if it had been alledged, yet it shall be intended so many of the Beasts which may be tyed and are usually to be maintained and remaining within the House, for it was agreed that (rising and lying down) shall be intended those Beasts which are nourished and fed upon the Land, and may there live in summer and winter, and also Beasts cannot be distrained if they be not rising and lying down upon the Land and receiving food there for some reasonable time, but some thought that beasts could not be rising and lying down upon a house without a Curtilage.

*Prescription for Common for Beasts without number.*

Note that it was agreed that all proceedings in inferiour Court, after a Writ of Priviledge delivered out of this Court are void (and before no Judge) and if they award Execution, this Court will discharge the party of Execution.

*Priviledge out of higher Courts.*

Note that a Fine was levied between *Charles Lynne* and *Walter Long*, and the Foote of the Fine was *Longle*, and it was amended

*Fine amended.*

*Michaelmas*

*Michaelmas 9. Jacobi 1611. In the Common Bench.*

*Hamond Strangis Case.*

*Feoffment to a Son and Heir for a valuable consideration. Avowry.*

**T**He Father for a valuable consideration infeoffs his eldest son and Heir, and adjudged that this was not within the statute of those, who infeoff their eldest Sons, nor a valuable consideration.

In Avowry, the Defendant avowes upon the person of the Plaintiff, in a Replevin, and the Plaintiff traverses the Tenure, upon which they are at issue, and at the *Nisi prius* it is found for the Plaintiff, and agreed that this was aided by the Statute of *Iosephus*, for this out of the Statute of 21 H. 8. and as it was at the common Law; or if the Defendant avow upon the person of a stranger, the stranger hath no plea, but out of his fee, which was mischeivous, the which was aided by the statute of 11 H. 8. 19. for he thought he would have traversed the Seisin.

*Teste of a Venire facias amended after verdict.*

The *Teste* of a *Venire facias* was the twelfth of June returnable, *in Trinitate*, which was the same day that the *Teste* was, and the Verdict it was moved to be amended, and to be made according to the Roll, the which was done accordingly, see 7 Ed. 4. for returning of *Disfringas* which was amended after Verdict, and *Crompton* one of the *Prothonotaries* sayd, that a *Venire facias* bare date in the vacation after the Term returnable in the Terme before, and it was amended according to the Roll, and the principall case was, the Roll was upon the entering of the issue, therefore you shall cause to come here twelve good and lawfull men, who neither, &c. within three weeks of *Michaelmas*, and the return of the *Venire facias* was made accordingly.

*Michaelmas 9. Jacobi 1611. in the Common Bench.*

*John Weekes Plaintiff, Edward Bathurst Defendant.*

*Ejectione firme.*

**A**LSO in *Ejectione Firme*, upon the Joyning of the Issue, the Defendant pleads not Guilty, and it was entered, and the aforesaid Lessor, likewise, where it should have been, and the aforesaid Plaintiff likewise, and it was amended: See this Case afterwards here the Case was, the Defendant pleads, that he is not guilty as the aforesaid *Weekes*, which was the Lessor, above against him hath declared, and upon this he puts himself upon the Countrey, and the aforesaid *Weekes* likewise, where it should be the aforesaid *John* likewise, and after verdict upon solemne argument this was amended

amended by *Coke*, *Warburton*, and *Foster*, and *Foster* cited 11. H. 7. 2. 26. H. 6. to be directly in the point; and 14. Ed. 3. Amendment 46. Ed. 3. Amendment 33. and *Warburton* seemed that first, that is *Wikes* for the aforesaid *Wikes*, &c. Is not materiall, and the last shall be amended, insomuch that this doth not alter any matter of substance, *Coke* seemed that this was amendable the same Tearme by the Common Law, if it were before Issue, see 5 Ed. 3. 7 H. 6. Which was immediately before the Statute of 22 Ed. 4. but in another tearme it was not amendable by the Common Law, nor the Statute of 14 Ed. 3. doth not extend to that, for this doth not extend to a Plea Roll, 46 Ed. 3. 13. accordingly, but the Statute of 8 H. 6. extends to any misprision, in the Plea Roll, or in the Record, and makes that amendable, 26 H. 6. Amendment, 32. 9 and 10. *Eliz.* Dyer 260, 261. And the difference is, where there there is an Issue that gives power to the Justices of *Nisi prius* to try that, then another Misprision shall be afterwards amended; and he said that it was adjudged between Sir *William Read* & *Lexure* in the *Exchequer*, that a Commission of these words (and the aforesayd Plaintiff likewise) shall not be amended, but in the principall case here, they all agreed that it shall be amended, and it was amended accordingly.

Michaelmas 1611. 9. Jacobi, in the Common Bench.

Promse against Worthinge.

Leonard Loves Case.

**I**N an *Ejectione firme*, speciall Verdict, the case was this, *Leonard Loves* the Grand-Father, was seised of a Mannor held in cheife, and of other Mannors and Lands held of a Common person in socage, and had Issue foure Sonns, *Thomas*, *William*, *Humphrey*, & *Richard*. And by his Deed 12 *Eliz.* covenants to convey these Mannors and Lands to the use of himself for his life, without impeachment of wast, and after his dease to the use of such Farmors and Tenants, and for such Estates as shall be contained in such Grants as he shall make them, and after that to the use of his last Will, and after that to the use of *William* his second sonn in tayle, the Remainder to *Humphrey* his third Son in tayle, the Remainder to *Richard* the fourth Son in tayle, the Remainder to his own right Heires, with power of Revocation, and after makes a Feoffment according to the covenant, and after that purchases eight other acres held of another common person in socage, and after makes revocation of the said Estates of some of the Mannors and Lands which were not held by Knights service, and after that makes his Will, and devises the Land that he had purchased as before, and all the other Land where-  
of

*Ejectione firme.*



of he had made the Revocation to *Thomas* his eldest son, & the Heirs Males of his body for 500. years, provided that if he alien, and dye without Issue, that then it shall remaine to *William* his second sonne in tayle, with the like proviso as before, and after dyed; and the jury found, that the Land, whereof no revocation is made, exceeds two parts of all his Lands, *Thomas* the eldest sonne enters the 8. Acres, purchased as before, and dyes without Issue male, having Issue a Daughter, of whom this *Defendant* claimes these eight Acres, and the *Plaintiff* claimes them by *William* the second Son.

*Dodridge.*

And *Dodridge* the Kings Serjeant argued for the *Plaintiff*, intending that the sole question is for the 8. acres purchased; and if the devise of that be good or not by the Statute of 34. H. 8. And to that the point is only, a man which hath Lands held in cheife by Knights service, and other Lands held of a common person in Socage, convey by act executed in his life time, more then two parts, and after purchases other Lands, and devises those, if the devise be good or not. And it seems to him that the devise is good, and he saith, that it hath been adjudged in the selfe same case, and betwene the same parties. And this Judgment hath been affirmed by writ of Error, and the devise to *Thomas* and the Heirs males of his body for 500. years, was good estate tayle, and for that he would not dispute it against these two Judgments. But to the other question hee intended that the devise was good, and that the Devisor was not well able to doe it by the Statute of 34. H. 8. And hee intended that the statute authoriseth two things. 1. To execute estates in the life time of the party for advancement of his Wife or Children, or payment of his debts, and for that see 14. *Eliz. Dyer*, and that may be done also by the common Law, before the making of this statute. But this statute restrains to two parts, and for the third part makes the Conveyance void touching the Lord: But the statute enables to dispose by Will a part, where he cannot dispose any part by the Common Law, if it be not by special Custome, but the use only was deviseable by the common Law, & this was altered into possession by the Statute of 27 H. 8. and then cometh the Statute of 32. and 34. H. 8. and enables to devise the Land which he had at the time of the devise, or which he purchased afterwards, for a third part of this Land should remain which hee had at the time of the devise made; and if a third part of the Land did not remain at the time of the devise made, sufficient should be taken out of that; but if the Devisor purchase other Lands after, hee may those wholly dispose: And for that it was adjudged, *Trin. 26. Eliz.* between *Ive* and *Stace*, That a man cannot convey two parts of his Lands by act executed in his life time, and devise the third part, or any part so held by Knights service; and also heelyed upon the words of the Statute, that is, having Lands held by Knights service, that this shall

shall be intended at the time of the devise, as it was resolved in *Butler & Bakerys Case*; That is, that the *statute* implies two things that is property, and time of property, which ought to be at the time of the devise. But here at the time of the devise, the Devisor was not having of Lands held by Knights service, for of those he was only Tenant for life, and the having intended by the *statute* ought to be reall enjoying, and perfect having, by taking, and not by retaining, though that in *Carrs Case*, cited in *Butler and Bakerys Case*, rent extinct be sufficient to make Wardship, yet this is no sufficient having to make a devise void for any part.

Also if the *Statute* extend to all Lands, to be after purchased, the party shall never be in quiet, and for that the *Statute* doth not intend Lands which shall be purchased afterwards; for the *Statute* is having, which is in the Present tence, and not which he shall have, which is in the Future tence; and 4. and 5. P. and M. 158. *Dyer* 39. A man seised of Socage Lands, assures that to his Wife in joynture, and 8. years after purchases Lands held in cheife by Knights service, and devises two parts of that, and agreed that the Queen shall not have any part of the land conveyed for Joynture, for this was conveyed before the purchase of the other; which agrees with the principall case, and though to the Question, what had the Devisor; It was having of Lands held in *Capite*, insomuch that he had Fee-simple expectant upon all the estates taylor, he intended that this is no having within the *Statute*, but that the *Statute* intend such having, of which profit ariseth, and out of which the K. or other Lord may be answered, by the receipt of the profits, which cannot be by him which hath fee-simple expectant upon an estate taylor, of which no Rent is reserved; and also the estate taylor by indentment shall have continuance till the end of the world; and 404 *Edw. 3. 371* *h. 4. rationabili parti bonorum*, it was pleaded, that the Plaintiff had reversion descended from his Father, and so hath received advancement. And it seems that was no plea, in so much that the reversion depends upon an estate taylor, and upon which no Rent was reserved; and so no advancement. So of a conveyance within his *Statute*, ought such advancement to the youngest sonne, which continues, as it is agreed in *Bighams Case*, 2 *Coke*, that if a man convey lands to his youngest sonne, and he convey that over to a stranger in the life time of his father for good consideration, and after the Father dies, this is now out of the *Statute*; for the advancement ought to be continuing until the death of the Father: And so he saith also in a judgment in *Butler and Bakerys Case*; that if a man devise Socage Lands, and after sell to a stranger for good consideration, his Lands held by Knights service, this devise is now good for all, for hee hath not any Land held by Knights service at the time of his death, and so he concluded that the

Houghton.

devise was good, and prayed Judgement for the Plaintiff. Houghton Serjeant for the Defendant, hathought the contrary, and hee argued that before the statutes of 32. and 34. of H. 8. men were disabled to devise any Land, and for that they cannot provide for their Wives, Children, or for payment of their Debts, and for remedy to that, Feoffments to uses were invented, and then to dispose the use by their Wills: and then experience shewes that to be inconvenient, and then the statute of 27. H. 8. transfers the use into possession, and then neither use nor land was deviseable without speciall Custome, and then this was found to be mischeivous, after five years experience, and then was the statute of 32. H. 8. made; and where by the statute of *Mortmain*, of those which did enfeof their begotten sons, a Feoffment by the Father to his son and Heir was void for all. Now by this statute this is good for 2. parts, and void only for the 3d part, & that for the good of the Lord; but as to the party that is good for all, it is agreed in *Mighton* case, 8 *Coke*. Then to consider in the case here, if all things concur that the statute requires; and to that here is a person which was actually seised of Land held by Knights service in 12. Edw. So that it is a person which then was having within the statute. 2. If here be such conveyance for advancement of his children, as is intended within the statute; and to that he seemed that so, notwithstanding that it may be objected; that here is no execution to the youngest children, inasmuch that it is first limited to such Farmers and Tenant, &c. But he intended that this is no impediment. Secondly, also there is a limitation to the use of his last Will. Thirdly, also there is a limitation to the use of such persons to whom he deviles any estate by his Will. But these are no impediments, for the last is no other but a devise to himselfe and his heirs; and there is not any other person knowne, but merely contingent; and it is not like to a remainder limited to the right heirs of A. B. for there the remainder is in Abeyance, but here it is only in contingency, and nothing executed in Intestate, till the contingency happen, and the not having of a son at the time shall not make difference, as in 38. *Edw.* 3. 26. in *formdon* in Remainder, where the gift was in one for life, the remainder to another in taylor, remainder in fee to another stranger; and he in remainder in taylor dyes without Issue in the life time of the Tenant for life, he in remainder in fee may have *formdon* in remainder without mentioning the remainder in taylor. But here he intends that the devise shall be void in respect of the Lands first conveyed, which were held in cheifly by Knights service; for the words of the statute are by assent executed, either by devise, or by any of them; and they are conjoynted; and it is not necessary that the time of the Conveyance shall be respected, but the time of the value. And notwithstanding that the Testator does not mention any time; But in so much as the

divided

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provision



provision of the Statute is to save priuor, seisin, and livery to the King; as if the man had 20 l. by year in Socage, and one acre in cheife; and makes a conveyance of all that, it shall be void first to the livery, and priuor seisin to the third part: So if he make conveyance of the 20 l. by yeare, and leave the said acre held in cheife to discend, and after that purchase other Lands to the value of the third part of all the conveyance of the 20 l. land, notwithstanding which, for the advancement of his Wife, Children, or payment of his Debts, for he had a full third part at the time of his death, which discended. And he supposed that the having of a dry reversion depending upon the estate tail, is sufficient, having within the words and letter of the Statute, and yet he agreed the case put in *Butler and Bakers* case; that if a man devise his Socage Lands, and after alien his Lands held in cheife by Knight service to a stranger, *bono fide*, this is good. So if he had made a reservation of his Lands held in cheife to himselfe for his life, in so much that his estate in that ended with his life, and hee remembered the case cyted in *Bret and Rigdens* case, Comment. That if a man devise a Mannor in which he hath nothing, and after hee purchase it, and dyes, the devise is good, if it be by expresse name. But when a man hath disposed of two parts of his Land, the Statute doth not inable him to devise the Residue; but he hath done all, and executed all the authority which the Statute hath given to him. But he agreed also, that the reversion is not such a thing of value, which might make the third part discend to the Heir; but it is uncertaine, as a hundred, and the other things of uncertain value contained in *Butler and Bakers* Case. And also he intended, that the remainder could not take effect, inso much that the condition is precedent, and it is not found that the eldest Sonne hath aliened, and then dead without Heir male, and so he concluded, and prayed Judgment for the Defendant.

In *Replevin* the Defendant avows for 9 s. Rent, the Plaintiff pleads a Deed of feoffment of the same Land made before the Statute of (*quia emptores terrarum*) by which 6 s. 8 d. is only reserved, and demands Judgment, if he shall be received to demand more then is reserved by the Deed; See 4 Ed. 2. Avowry, 202. 10. H. 7. 20. Ed. 4. 7. Ed. 4. Long. 3 Ed. 4. 22 H. 6. 50. This Deed was without date, and it was averred that it was made before the Statute of (*quia emptores terrarum*) which was made in the 18. of Edw. 1. And also it ought to be averred to be made after the beginning of the Reign of Richard 1. For a writing after the beginning of his Reign checks prescription. But if a man hath a thing by grant before that, he may claim by prescription, for hee cannot plead the grant, inso much it is before time of memory, and a Jury cannot take notice of that, and for that the pleading before with the said averments was good.

If debt be due by Obligation, and another debt be due by the same

*Replevin,  
Grant without  
date.*

*Obligation.*

Debtor to the same Debtee of equall summe, and the Debtor pay on sum generally, this shall be intended payment upon the Obligation.

*Earl of Cumberland and Hilton*

*Accompt.*

**I**N an action of Accompt, the (*Venire, facias*) was returned by the Coroners; (The execution of this Writ doth appeare in a certain Pannell fixed to this Writ) and the Pannell and names of the Jurors between the Earl of Cumberland, Plaintiff, and Thomas Hilton Defendant, in a plea of Debt, where it ought to be in a plea of Accompt, and yet after Verdict day was given to the Coroners, to amend their Return, which was done accordingly.

*Michaelmas, 1611. 9. Jacobi, in the Common Bench.*

*Ferdinando Crosse, Informer, against Westwood.*

*Information.*

**I**N Information upon the Statute of 5. Ed. 6. Chap. 14. exhibited by Crosse against Westwood, for that the Defendant had bought in grob, and gotten into his hands by buying, and not by Lease, 40. quarter of Wheat meale, price of every quarter 40. shillings, to the intent to put that in water, and after of that being dried again, then of that to make starch, against the form of the said Statute, and so demanded fourscore pounds for the King and himselfe, according to the Statute; and upon this the Defendant demurred in Law, upon the Information this case came in question: And it was argued by Nicholls Serjeant for the Defendant, that there was not any Law against Ingrossers known, what was ingrossing before the making of this Statute, which declares and describes who shall be an Ingrosser. Then he considered, if the Ingrosser described in the Information, be such an Ingrosser which is intended by the Statute, and he seemed that no, for he said, the Ingrosser contained in the Information, is not one which bought Corn growing in the field, nor Corn, nor dead Victualls, which are the words contained in the Statute; but he is charged for buying of wheat meal, and it seems that that is not within the words of the Statute. Also Ingrosser intended within the Statute, ought to buy that, to sell the same againe, and so is not the Ingrosser in the Information charged, and if he be not within the words, he shall not be within the punishment; for it is a penall law, and shall not be taken by equity, and so much the more, because it inflicts corporall punishment upon the Offender. And then to consider the words of the Statute, he supposed that Wheat meale is not within the words, Corn growing, nor Corn; but the question is, if it be within the words, dead Victualls: and to that he said, that it hath been adjudged, that a Costermonger which buys.

buyes Apples to sell againe, is not within the words (dead Victualls) and he said that Flower and Meale are things of which Victualls are made, and not Victualls themselves. But there ought to be another thing done to them by the industry of man to make them Victualls; As if a Baker buy Wheat, and make that into Bread, this is out of the provision of the Law, and not aided by the Proviso, which provides for *Fish-monger*, *Poulter*, and *Butcher*; which buyes such things which concern their *Faculty*, *Crafte*, or *Mystery*, if it be not by fore-stalling, but this doth not extend to all *Crafts*. But hee supposed that when the nature is altered, that is out of the purviewe, and is another thing, and shall not be eplevied, notwithstanding that *Replevin* lyeth of Sow and Piggs, where the Sow only was imparked, but not of Leather made in Shoos. Also he seemed that the *Defendant* is not charged that he had an intent to sell the same again: And if a man buy Corne for the provision of his house, this is out of the *Statute*, notwithstanding that it be by Ingrossing. And so if a man buy Barley, and make that into *Malt*, and sell it again in *Malt*: Or if a man buy *Oats*, and convert that into *Oatmeale*, or other Flower, and then sell it again, this is out of the *statute*: and if so it be, then upon this he inferred, that this is not so much as if he had sold that afterwards, when he had altered it in nature, as in making of *Wheat-meale* into *starch*; for in the cases before cyted, things bought are of another nature: So if a man hath many Farms or Grounds sowed with Corn, and he sells them to another, this is no fore-stalling within the *statute*, if it be not driving to *Markets*: and he saith, that *Regrater* is defyned by the *statute*, to be him which buyes in one *Market*, and sells that in another *Market* within four miles, and he is an *Ingrosser*, and *Regrater* also: So if a man buy *Wheat*, and makes Cakes of that, this is out of the *statute*: Or if a *Merchant* buy Corn beyond Sea, and sell that here, this is out of the *statute*, for it ought to be bought and sold also within the Realm; so if Corn reserved for Rent be sold again, this is out of the *statute*, and so concluded; First, that the buying of *Wheat-meale* is not buying of Corn growing, Corn, nor dead Victualls, and the sale of that in starch, is not the sale of the same thing again, and prayed Judgment for the *Defendant*.

*Dodridge* Serjeant of the King, for the King, and the Informer supposed the contrary, and to him it seemed, that there are three things considerable, upon the *Statute*: That is, the Scope, the Letter, and the offence, and to the offence, he intended that it is the offence which is contained in the Information which is provided to be punished by the *Statute*, and he said that the offence is confessed by the Demurrer: And he said there were divers good lawes against *Ingrossers* before the making of this *Statute*: But it was not defined who was an *Ingrosser*, and this was the Evasion that.

*Dodridge*



that such Malefactors escaped without punishment. And he said there are three notable Enemies to the Common Wealth, first Fore-  
 stallers, secondly Regraters, thirdly Ingrossers: And fore-staller is he which prevents the Sale in open market, Ingrosser is he which ingrosseth in his hands, and Regrater is he which sells againe, and he which will be an Ingrosser, will be a Fore-staller also, and so of the contrary, and these offences make Dearth, and for that their gaine is called a (wicked gaine:) See the *Statute* of 21. Ed. 1. *Rastall Fore-stallers* 1. And they are basely to be esteemed, which marchandise of Marchants, because they cannot gaine unlesse at least they lye: And this Statute hath given a livery to those Malefactors by which they may be knowne, for he hath them described and defined, and this is the scope of the *Statute*; thirdly he considered the Letter, and for the better intelligence of that he considered the Body and *Proviso* of the Statute, and tie himselfe to an Ingrosser, and would not meddle with the other offences contained in the Statute, the words of which are, whatsoever person or persons shall ingrosse or get into his or their hands by buying, &c. (other then by Lease, &c.) and Corne growing in the fields, or any other Corne or graine, &c. or other dead victualls whatsoever, shall be accepted, reputed, and taken an unlawfull ingrosser, &c. And it hath been objected that it is a penall Statute, and for that shall not be taken by equity, and also is declaratory, and for reason also shall be taken strictly: But he supposed, that admitting that the offender contained in the information be out of the Letter of the *Statute*, that yet he shall be within the equity, and that the *Statute* shall be taken by equity, but he intended first, what was within the Letter of the Statute, for Wheat made into meale is Wheat, and Barley made into Malt is Barley, and so it is contained in the information, that is, that he hath bought Wheat made into Meal, and allowing that Corne is victuall, then *a fortiori*, meale is dead victuall, for it is a degree neerer to the use of man and to sustentation, and by the same reason that it is not victuall, insomuch that another thing ought to be made to it, before it may be used, by the same reason flesh shall be no victuall, for that ought to be boyled or roasted, which is another thing also before it can be used: and he said that meale is the staffe of sustenance, and of all dearths, the dearth of Meale and Corne is the most greatest, and he which wants bread, wants all other victualls, for all others without this breedes diseases, and for that Corne is the victuall of victualls, and so he supposed this remaines Corne, and admitting that not yet it is within the words (dead victualls) Also he intendes that the Statute shall be taken by equity, notwithstanding it be penall, insomuch that it is for publicke good, as the Statute of 25. Ed. 3. of petty treason, con-  
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taines the Master only: And yet if a Servant kills his Mistris, that shall betaken within the *Statute*: And so if the Servant kills his Master after that he is departed out of his service, upon malice conceived during the time that he was in his service, this shall be also within the *Statute*, and yet is not within the words of the *statute*, and so of the *statutes* of 13. and 17. *Elix.* of fraud upon taking by equity, and yet all these *statutes* are penall: But insomuch that they are made for the publicke good, and for punishment of offences which tend to the contrary, they shall be out of the generall rule; But he intended that the same thing which was bought was sold againe, for it is confessed by the information, that he hath sold Meale, and it was not the thing that was first bought, and if it were sustenance before that the water was put to it, the putting of water to it doth not make alteration, and is contained in the information, that the Defendant sold the same meale that he had bought by the name of Starch, and this is confessed by the Demurrer, and by that if meale be victuall, then he hath sold meale victuall by the name of Starch, and to the objection, that it is not the same thing, insomuch that the Replevin doth not lie, for the meale after that is made in Starch, he saith Replevin doth not lie for the Corne it selfe if it be not in bags, and if the meale were in bags, notwithstanding that water were put to it, yet Replevin lies, and it is reason that this shall have a large and beneficiall construction, insomuch as it apperes by the preamble, that this is made against the Catterpillers of the Common Wealth: And to the objection that the *Statute* is Declaratory, and for that it shall not be taken by equity, if this rule shall be observed, then all the questions in the Court of Wards, and in *Butler and Bakers Case* 3. *Coke* they have been in vaine: And yet it appeares that equity was there taken for equity: But in these cases the exposition may be besides, but not contrary to the words, and also he intended that the *Proviso* expounds the Body of the *statute*, and by the *Proviso* it appeares, that the buying of barley and converting it into Malt, and the Sale of that afterwards, and the buying of Oates and the converting of that into Oate-Meale, and the sale of that afterwards should be within the *Statute*, if it had not been excepted by the *Proviso*; and yet there is an alteration of the thing which is bought: And if a man buy Barley by forestalling, and make that in Malt, and then sell that againe, this is within the *Statute*, and there is no difference betwixt this Case and Malt, for the Barley is put into water and dried againe, and so it is here, the Meale is put in water and dried againe, and yet that is within the *Statute*: And the manner and nature of offence, every one which hath a Household and Family knowes, for the finest Wheate Meale makes sustenance for the Master of the Family, and the other makes.

makes severall sorts for the residue of the Family, and the Bread makes Bread for Horses; so that the vertue of that is, that it feeds both Man and Beast, and all this is prevented by making that new devised vanity, and the quantity of Wheat which is imployed incredible, and may feed many, and if the makers of that have gained the name of an occupation, this is worse, for this furthers vanity, and takes away the sustenance of many, and inhanceeth the price of Wheate, and is so new an invention that there is not a Latine word for it, and so he concluded that he is an Offender, and within the scope of the letter of the Law, and that the *Preamble and Proviso* hath been so expounded, and that as to meane occupations, as Turners and such like which bought Hydes and sold them again, and he said that they did them further for the use of man, and made that more apt and fit for use, and without that a man could not use them, but in this Case the Starch-makers further the abuse, and prayed Judgment for the King, and for the Informer.

Haughton.

And at another day this case was argued again by Haughton for the Defendant, that the Statute is penall for forfeiture of Goods, as for coporall punishment, and for that it shall not be taken by Equity, nor by interpretation, but strictly according to the Letter, as in *Reniger and Fogassas case*, *Commentaries* 18. By Pollard, it is a principall in Law, that a penall statute shall not be taken by Equity, as in the Statute of Westminster 1. chapter 35. Gives an attainr in real action, and notwithstanding that perjury be an offence against both the Tables, and in attainr it is of necessity that it be perjury in the petty Jury, and yet this doth not extend to personall Actions, 1 Ed. 3. 6. 34 Ed. 4. 7. 1 Ed. 3. 6. Gives attainr as well for Damages excessive, as for the principall, and this shall be taken strictly, also as it is sayd by *Fineva*, 14 H. 7. 14. a. and in 27 H. 6. 8. Generall penall Statutes shall be limited to certaine times as the Statute of Westminster 2. chapt. 11. Which gives power to Auditors which finde accountants in Arrearages, to commit them to prison, but it ought not to be forthwith, and this for the favour of the Defendants, and this is the reason also of the Judgment in *Fogassas Case* by the Statute of Agreements, that every agreement shall be taken within the Statute, and so the Statute of 23 H. 6. Provides that the Sheriff shall not let out of a Hundred is not within the Statute, and it is also agreed in *Partridges case*, Com. 87. that the Statute of 32 H. 8. of buying of Tithes, shall not be taken by Equity, and the reason is there given, insomuch that it is a penall Law, and if it be so that the Statute shall not be taken by Equity he considered if it be within the words, and to that he intended that it is not Corne which is bought, for it is changed into another thing, and also it is not dead



dead Victuall, for it is not Victuall till another thing is made of it, also the same thing that was bought ought to be sold again, or otherwise it shall not be within the Words of the *statute*, and by consequence out of the penalty, as if a man buy Corn, and make that into Meale, Bread, or Biddings, this is not within the *statute*; so the buying of Apples and selling of them again, it is no victualls within the *statute*; so Butcher which buyes Cattell, and those kill and sells again is not within the *statute*, and he sayes that Starch is good Food when it is dry again, which proves that this is another thing then the Meale which was bought, and so out of the Letter of the *statute*, and to the *Proviso* which excepts Barley that is bought and made in Malt, and Oates, made in Oate-Meale and sold again, it seems that this is an idle *Proviso* and surpluage, as in *Porters Case*, 1 *Coke* 24.6. in the *statute* of 27 H. 8. *Proviso* to except good uses out of the *statute*, inables men to devise to such uses, and to the *statute* of 5 Ed. 6. chapter 16. the Body of which extends only to Officer, Covenant, Administration of Justice, or the Revenue of the King, as Receiver, Comptroller, &c. And yet a Keeper of a Park is excepted out of this, more for the satisfaction of the ignorant Burgeses then for any necessity, and so he concluded and prayed judgment for the *Defendant*.

*Montague* Serjeant of the King, for the King and for the Informer argued to the contrary, that as to the objection that Colstermongers are not within the *statute*, he sayeth, that that is a thing of Delicacy, and not victualls within the *statute*, but he sayeth it was adjudged in the Exchequer, that the buying of Meale and the selling of that again was within this *statute*, and in this case the Information is that the *Defendant* had bought Meale and sold the same again by the name of Starch, which is confessed by the Demurrer, and for the exposition of the *statute*, he considered the mischeife before the making of that, the remedy which is provided by the *statute*, and the Office of a good Judge, that is to advance the remedy and suppress the mischeife, and he intended that this was punishable by the Common Law in another forme, as Waste, notwithstanding as Action doth not ly, yet *Prohibition* lyes at the Common Law, and by the *statute* of 27 Ed. 3. Justices in Oyre, ought to inquire of all greivances and oppressions to the People, and there cannot be greater greivance or oppression then that is which deprives them of their food, and for that, he is called the Oppresser of the Poore, and *Fleta* calls him Woolfe which ought to be hunted from place to place, and 43 *Affiso*. was punished by Fine and Ransome, and yet then the offence was uncertain, but now it is made certain by defining it by this *statute*, so that this is a *statute* of Definition only, and the *statute* of 31 Ed. 1. inflicts the punishment, and

*Montague.*

to the objection, that it is not the same thing which is sold, which was bought, he said it is the same in intent, for it produceth the same mischeife.

Secondly, It is the same substance, and the same forme, thinke the formall substance, which gives the being, but not an accidental forme, and he saith, that if a man have Corne, and another by wrong takes it from him, and doth convert it into Meale, he may take that back again, otherwise of Iron made into an Anvill, but Iron made into Timber, and plate altered in fashion, may be taken back again, otherwise if it be converted into Coyne, and so upon the Statute of 21 H. 8. If a Servant sell the Goods of his Master, and steal the Money, that is out of the Statute, but if the Servant carry Corne to the Mill, and this is converted into Meale, and then the Servant steales it, this is within the Statute, for this is the same thing, 21 H. 8. A man pleads (he appearing seized to the same use) it shall not be intended the same, but such uses, and *Browning and Beesham* in the *Cyng*. A man is bound to pay twenty pound at *Michaelmas*, and also afterwards to pay twenty pound at the same Feast; and this was intended the same Feast in another year, and not in the same year, so that the word (same) shall not be so precisely taken, but as Patent of the King for making of a thing, of which a man hath made new invention is good, if it be limited for certaintime only, as *Hobbes* hath a Patent for making of *Brissade* only, as a thing newly invented by him, but in so much that this varies only in the form of making of that, and not in substance, the Patent was adjudged voyd, so a Patent made to a Cutler for Gilding, in so much that this varies only in forme, this was not allowed to be a new invention, so a Patent made to *Johnson* for new casting of Lead, in so much that this varies only in forme, and not in substance, this agreed with the ancient, this was also void, and if the starch made be another thing then the Meale which was bought, then it ought to be another in nature and quality, but this is not, for starch is used for Victuall in *Spain* and other Countries, as *Ryce* is used, see 46 Affick. 27. and he intended that the *Proviso* made that cleer and without question, for there cannot be a difference made between that and Malt, and if Malt had not been within the Body of the Act, this would not be exempted by speciall *Proviso*, and so the Statute of 25 H. 8. chapter 2. for transportation of Victuall in *Ireland*, except Meale, which proves also that Meale is included within the words, dead Victualls, and which hath been within the Body of the Statute if it had not been excepted, and to the Objection that it is penal Law, and for that shall have strict opposition, and not by equity, but he saith that this rule failes as to the interest of the Common-Wealth, that is, when the Common-Wealth is intervenient; and

to the Objection that this is a thing invented after the making of the statute, he answered that, with the case of *Saint-John*, 5 *Coke* 71. b. Which inhibits Hand-Gum, and it is there adjudged that Dags and Soone-Bowes, which are of later Invention shall be within the statute for they are their invention, and their form of the things which are inhibited, and so *Vernons* case, 4 *Coke*, if he to whose use incoits his Son and Heir, this shall be taken within the statute of *Martbridge*, and yet he to whose use cannot make a Feoffment, whose use were not known till many yeares after the making of this statute, and *Baker* furtheres the Meale for the use of man, and for that he may sell it in Bread without any punishment, and then he sayd it was the Office of a good Judge to suppress the mischeife, and to advance the remedy as the Lord *Anderson* sayth in *Brownes* Case, 3. *Coke*. And so he concluded and prayed Judgment for the King and the Informer. And note that this case was solemnly argued by all the Justices of this Court, and it was adjudged, that this was ingrossing within the statute by *Warburton*, *Foster*, and *Winch*. But the Lord *Coke* agreed the contrary, *Walmesley* being absent that Terme.

The same question was argued the same Terme in the Exchequer upon an Information there exhibited by one *Collins* an Informer, and it was there argued by *Hitchcocke* of *Lincolnes Inne* for the Defendant, and he argued that the Starch was not the same thing which was bought, no more then if it had been made in Bread, and he cyted the Booke of 5 *H.* 7. 15. 16. Where it is agreed that if a man takes Barley and makes Malt of that, that he from whom it was taken could not take the Malt, for that, that there the thing is altered in another nature, and he intended that the Starch is not the same in number nor quality, but he agreed, that if wheat be only grownd, that this notwithstanding is within the Statute, but if it be made into Bread, then sold, it is not within the Statute, for then it is another Body, and other things added to it, and the forme is also altered, and the forme gives the being and the name, and if Water be turned into Wine, it is no Water, though it be by miracle, so if a Parson be made Bishop, he is not the same person, for Honours change Manners, and this is his reason that the Writ shall abate, for it is newly created, as of nothing, 7 *H.* 6. 15, 22 *R.* 2. *Bre.* 93. b. 2 *R.* 3. 20. Also the Statute of 21 *H.* 8. Which provides that the party from whom any Goods are stolne, after that the Felon is indicted, shall have restitution of the same goods, but if Corn be stolne, and converted into Meale, the Owner shall not have restitution, for it is not the same which was stolne, but if Plate be stolne and altered in other forme, yet the owner shall have restitution of that as he sayd, which was adjudged for the King.



40. *Eliz.* But where restitution upon a Writ of Error, where the Judgment is the same thing shall be restored, that if yet teame be sold by *feri facias*, and after the Judgment is reversed by Error, he shall not be restored to the Teame but shall have the money for which it is sold, also he saith it is not the same in number and substance, for the 1 thing was corrupt, and the corruption of that was the beginning of the new, and the Wheate is the matter of which, and also Water, and fire and the heat of the Sun, and after that it is made in Starch, it will not be dissolved and made into victuall, no more then Bread, and the worst Wheat will make the best starch, also he intended that it is not in the same condition nor similitude, also he objected that (*Ligamen*) which is the word contained in the Count, is no Latine word at all, but (*Legumen*) is the latine word, and that is latine for Pulse, and that not being any latine word, the english which is added will not help it, and so he concluded and prayed Judgment for the Defendant.

*Dodridge.*

*Dodridge the Kings Serjeant for the King and for the Informer,* argued that the starch is the same, (*Numero*) in number, quality, and substance, not in likeness, and that the statute is no law of explanation but of *dispositio* of three severalls, which make dearth without want, and the fore-stalling prevented the punishment of Law before the making of this Statute; but now these are severall degrees, that is fore-stalling is commonly ingrossing and regrating, and Ingrosser is alwayes Regrator, and that the Defendant in this case is Ingrosser of Victualls, that is victualls which is the staffe of mans health, and the want of that is more greivous then the want of all other things, and the dearth of that is the most pinching dearth which may be, and the gain of that is a base gain, and they which basely buy of Merchants that they may straight ways sell not any thing unless they may get great gains or save in the measure, & they are called *Regrators*, as *Grators* of the faces of the People, and if this Statute had been executed, this had prevented many Dearth, and to the objection, that it is a penall Law, and for that shall be taken strictly, and there is a generall rule, and as true as it is generall, but it is true if it be not within the exception, that is, if publick good doth not intervene, and here it concerns the *Commonwealth*, as much as the lives of men, and many other penall Statutes have been taken by Equity, as the Statute which makes that to be petty Treason if the Servant kill his Master, and in the 19 H. 6. It is agreed that if the Servant after he is departed out of the service of his Master kill him upon any malice conceived during the time that he was in his Service, this shall be taken within the Equity of the Statute, and so the Statute of 33 H. 8. Was made precisely against Hand-Guns and Dagges, are taken to be within the Equity of

of that, notwithstanding that they were invented after the making of that *Statute*, and were not known at the time of the making of that, for they are the same in intention, as it is resolved in *Strechus Case*, in *Coke* 71. b. And to the words of the *Statute* (who shall sell the same) it intends that starch is the same in all, but only in similitude; for a thing which is of the same similitude is not the same, but like the same (for no like is the same.) Also he intended that it is the same both in number and form, and he agreed (that forme gave the being) for that is not the accidentall as here it is, but it is the substantiall forme, and every one knows that Meale of Wheat, is the same as Pepper beaten in a Morter, and Pepper and all other Spices, so that it is the same in number, existence, substance, and essence, and he intended also the same in intention, for Meale is Victuall, and is dead Victuall, be it Corne or Meale; and Corn grownd, and made in Meale, then sold, yet that remains dead Victuall, and Meale is the same dead Victuall, though that it be not the same Corne; and to prove that Corn is Victuall, he cyted the *Statute* of 25 *Edw.* 3. 5. *Stat. Chap.* 7. Which provides that no Forrester shall make any gathering of Victualls by colour of their Office; and hee intended, that Corne was within this *Statute*, and so also of the *Statute* of the 3. *P.* and *M. Chap.* 15. *Rastall*, Universities which provides, that to the Purveyor, Bargainor for any Victualls within 5 miles of any of the Universities of *Oxford* or *Cambridg*, where Grain and Victuall are joyned together.

So the *Statute* of 25 *H.* 8. *Chap.* 2. abridged by *Rastall*, Victuall, 15. which inhibits the transportation of Victuall, if it be not of *Meal* and *Butter* into *Ireland*, by which it appears that *Meale* is dead Victualls: And he said, that Victualls is that which refresheth men, and Victualls are those things, which to the use of eating and drinking are necessary. So that *Meale* is the same in number, though that the Corne were turned into *Meale*. And he cyted *Peacock* and *Reynolds Case* to be adjudged 42 *Eliz.* That if a man buy Corne, and convert that into Meale, and so sell it, it is within this *Statute*: And hee said, that if a man be made a Knight, hanging his action, that this shall abate his action, but yet he remains the same person, but his name is changed, which is the cause of the abatement of his action, 7 *H.* 6. 15. Also the *Defendant* is concluded by his demurrer upon the *Information*, to say that it is not the same thing, for this is confessed by the Demurrer; and though that the name be changed, this is not materiall, if the substance be the same; and he agreed, that a Baker which buys *Wheat*, and makes it into Bread, is not within the *Statute*, for he furthers that to the use of man, as a Curryer makes the Leather more fit and apt for use; but so doth not he which makes it into starch, for he furthers the abuse; for it is no lawfull Occupation.

tion, but idle and frivolous furtherance of vanity of men. And in 33. H. 6. 2. If a man enter into the Land of another man, and cut Trees, and that square, and make into Boards, yet if the Owner enter, he may take them: But if it be made into a House, otherwise it is, for there it is mingled with other things, as it is 5 H. 7. 15, 16. So Iron made in Anvill: But of Leather made in Shoes otherwise it is, inasmuch that it is mingled with other things, 12 H. 8. 11. a. A dead Stag is not a Stag, but is a certain dead thing, and flesh. As a man dead is not a man; but agreed the Book of H. 7. 15. and 16. That Corne converted into Meale cannot be restored, nor reprized, no more may that if it remains in Corne, if it be not in Baggs; And he said, that upon the *Statute of Merton*, the Re-disseisin after the Recovery in *Affise*, if the same Disseisor makes Re-disseisin, the Sheriff may examine that, &c. And it is agreed in 27 H. 6. That if Tenant in taylor be disseised, and recover in affise, and is put in possession, and after his Estate is altered, and he become Tenant in taylor after possibility of Issue extinct, and then the Disseisor makes Re-disseisin, that this is aided by the *statute*, not that it is alteration of the Estate: And also he saith, it appears more fully by the Proviso, by which it is provided, that Barley turned into Malt, and Oates turned into Oatmeale, if it be by Ingrossing, it is within the purview of the *statute*. So if it be by way of Fore-stalling; or if they sell them again before that they are converted, shall be Regrators; And to the Objection, that other things, that is, Water and Fire are added to that, he saith that none of them remains, for the Fire dries the water, and the fire also goeth out, and so he concluded and prayed Judgment for the King, and the Informer, and it was adjourned.

*Michaelmas, 1611. 9. Jacobi, in the Common Bench.*

Dower.

**I**N Dower against Infant which makes default upon the grand Jury returned, and agreed by all the Justices, that Judgment shall be given upon the Default, for the Infant shall not have his age, and so it was adjudged upon a Writ of Error.

*Charnock against Currey, Administrator of Allen.*

Debt against  
Administrator.

**I**N debt upon an *Obligation* against the Defendant, as Administrator. As above, he pleads Judgment had against him in an action of debt, and over that hath not so satisfied, to which the Plaintiff replies, that this Judgment was for penalty, and the condition was for a lesser sum; and that the Plaintiff in the first action had accepted his due debt, and had promised to acknowledge satisfaction of the Judgment at the request of the Defendant, and at his charges: and the Administrator



frater which was the *Defendant*, did not make request upon fraud and Covin, to avoid the *Plaintiff's* action: Upon which the *Defendant* hath demurred, and so confesseth the matter of the Plea. But *Foster* seemed that the *Plaintiff* ought to aver, that the *Plaintiff* in the first action hath offered to acknowledg satisfaction, and that otherwise he should be put to his action upon the Case; but *Coke* and *Warberton* intended that the *Replication* is very good without such averment; for it shall be intended, that the *Plaintiff* will perform his promise: But further, this Demurrer which was only for part, was also for another part, an Issue joyned for the other part, which was to be tryed by the Country; and which shall be tryed of the Issue, or of the Demurrer, was the question; and it was agreed by them all, that the Issue, or Demurrer shall be first at the discretion of the Court, see 11 H. 4. 5. 38. Ed. 3.

Commission is granted to the Councel in *Wales*, of which the *President*, *Vice-president*, or *Cheife Justice* to be one; And the question was, if they might make a Deputy, and it was agreed that a delegate power could not be delegated, but they might make an Officer to take an accompt in any such act.

Commission to  
the Councell in  
Wales.

Note that a Caveat was entred with a Bishop, that he should not admit any without giving notice, that the admission, this notwithstanding is good; but if he admit one which hath no right, he is a disturber, but otherwise the Caveat doth nothing, but only to make the Bishop carefull what person he admits.

Caveat to a  
Bishop.

*Foster Justice* seemed, that if the Ordinary now after the Statute of 21 H. 8. grants administration to one which is next of Blood, that he cannot repeale it; but *Coke cheife Justice* seemed the contrary, and that he incurred the penalty of the Statute only. And if an Administration be granted to one which is next of Blood, upon which the first Administrator brings an action of debt, & hanging that, upon suggestion that the first Administration is void, another Administration is granted; and it seems that this second Administration granted upon this suggestion shall be repealed from the first, though it be generall, and without any recicall of it. But if the second be declared by sentence to be void from the beginning, then the first remains good.

If administra-  
on to the next  
of blood cannot  
be repealed.

Action upon the Case was brought for these words, that is, *thou hast killed I. S.* And it seems that the action doth not lye, for a man may kill another in execution, and as Minister of Justice, or in Warr, in which things killing is justifiable.

Action for  
words.

Michael.

*Michaelmasse 1612. 9. Jacobi, in the Common Bench:*

*George Barney against Thomas Hardingham.*

*Trespasse for  
breaking a  
House and ta-  
king a Cow.*

*Haughton.*

**I**N Trespasse for breaking the House, and taking of a Cowe, the Defendant pleades that the King and all those whose Estates he hath in the hundred, have had Turne, and at the Court held such a day it was presented, that the Plaintiff hath incroached upon the high Way, for which he was amerced, and the amercement was affirmed by two Justices of peace, according to the Custome of the Turne aforesaid: And that he being Bayliff of the hundred, by vertue of a Warrant to him in due manner made and directed, hath entred the said house, and taken the said Cowe for distresse, for the said amercement, and carrying it away, which is the same Trespasse, and so demands Judgement, upon which Plea the Plaintiff Demurred: And by *Haughton* Serjeant for the Plaintiff, the Plea in Barr is not good, and first he conceived that it was not good, in somuch that the King hath made his Prescription by whole Estate, and he intended that he could not make his Prescription by whole Estate, in somuch that this lies in grant, as it is 12. H. 7. 15. where it is agreed that by nothing which lieth in grant, a man may Prescribe, (by whole Estate.) Also the Plea is that the King was seised in his Demesne as of Fee, where it ought to be in Fee only, in somuch that it is a thing only in Jurisdiction or Signiory and not Manurable, as in 8. H. 7. 7. H. 4. 30. *assise*. In an Action of Debt upon Reservation made upon Lease of a Mannor and hundred, it is agreed that the hundred is not in Demesne nor Manurable: Also the Plea is not good, in somuch that it is not Pleaded, before whom the Turne shall be held: And allwaies when a man claimes a Court by Patent, he ought to shew before whom his Court shall be held, otherwise it shall not be good, so of Conuifance of Pleas, otherwise it is if it be in a Turne, for that shall be intended a certaine ancient Court. See 44. Ed 3. 17. 1. H. 4. 6. 6. H. 4. 1. Also the Statute of *Magna Charta*, chap. 35. requires that it should be held in the accustomed place, and so it ought to be alledged, or otherwise it is against the Statute, and for that it shall not be good, for it is of the nature of Sheriffs Turne and derived out of that: See the book of Entries in *Replevin* 2. Also the Statute of *Magna Charta*, chap. 14. appoints that the officers shall be the Sheriffe, and this is not pleaded but generally by two Justices of Peace upon their Oath: And also it is not pleaded to what Sum the amercement was made. Also it is pleaded that he being a Bayliffe of the Hundred, by vertue of a Warrant to him in due manner directed and made, hath

hath taken the distresse, and doth not plead the Warrant certainly nor the place where it was made, And for that the Plea is not good. Also he pleades that he took and led away the Cowe, in name of distresse, and he ought to say that he took it and impounded it, for that (he tooke it and carried it away,) imports that he tooke it to his owne use, 9. Ed. 4. 2. 20. Ed. 4. 6. And so he concluded that the Barr is not good, and prayed Judgement for the Plaintiff: And Barker (Serjeant for the Defendant) conceived that the Prescription for the Hundred (by which the Estate) was very good, and for that, See 12. H. 7. 17. a. 8. H. 7. 13. H. 7. Also he intended that the title to the Court is very good, notwithstanding that it is expressed before that it shall be held, inasmuch that the Law takes notice of the Turne of the Sheriffe, and that he is Judge of that, and that the Affirance is very good, inasmuch that this is according to the Custome of the Turne afore said: And the Warrant of the Beyliffe is very well pleaded, and more is pleaded then need, for it is the duty and appertaineth to his office to gather the amercements, and he might do that without Warrant by force of his office: But if it be upon plaint between party and party, otherwise it is, and for that see the book of Entries 553. And also the charge in the Action is for that, that he took and carried away, and of that he made Justification, and he cannot Plead otherwise, and to the (whose Estate, &c.) That a man cannot Prescribe to have a thing by (whose Estate) which lieth merely in grant, without shewing of a Deed, yet when that is appurtenant to another thing, as here the Court is to a Hundred, it may very well that do, and 33. H. 8. B. Leese, when the penalty is Presented by the Jury it selfe, there needs not any affirance: And so he concluded that the Plea in Barr is very good, and prayed Judgement upon that for the Defendant: And Coke cheife Justice said, that Turne of the Sheriffe is derived of Turner, which signifies to ride a Circuit, and so of that is derived Turner, and of that the Turne of the Sheriffe, and of this is derived the Hundred, and from this the Leese: And it seemes to him, that he ought to plead, before that the Court shall be held, inasmuch that it is against Right, and so it was adjourned.

Barker.

Barr not good.

Michae'mas 1611, 9. Jacobi, in the Common Bench.

Hill against Upchurch.

NOTE that Coke cheife Justice said, that it was adjudged in 27. of Elic. For the Mannor of Northall in the County of Essex, that admitting that a Copy-hold may be Incalled by the Statute, that then Custome that a surrender shall be a Barr or discontinuance.

Copy-hold Incalled.



continuance of such Estate say is good, for as well as the Estate may be created by Custome, as well it may be Barred or discontinued by Surrender by Custome.

## Brandons Case.

Extent upon  
a Statute.

**N**OTE if a Mannor or other signiory be extended upon a Statute, and a Ward falls which is a sufficient value to make satisfaction of the Extent, yet this shall not be any satisfaction in tender to satisfaction: Inasmuch that this is only the fruit of Tenure, and not like to cutting of Trees, nor to digging of Cole or other Ore: And so Coke saith Justice, that it hath been adjudged, and with this agreed the booke of 21. EA. 3. 10.

Summons in  
Dower.

The manner to make Summons in Dower, if the Land lieth in one County, and the Church in another County: Then upon the Statute the Sheriffe ought come to the next Church, though it be in another County, and there make Proclamation, as the Auditor in Accounts ought to commit the Accomptants found in arrearages to the next Gaole, and there ought to be committed though that they are in another County.

Patent of a  
Judge of the  
Common bench.

The words of a Patent of a Judge of the Common Bench are as follows, that is to say, James by the grace of God, &c. Know that we have constituted *Humphrey* Serjeant at Law, one of our Justices of the Common Bench, during our good pleasure, with all singular Valors and Fees, to the same office belonging and appertaining. In Witnesse of which, &c.

*Michaelmasse* 1611. 9. *Jacobi*, in the Common Bench.

*Jacob* against *Stilo* Sowgner.

Action upon the  
case for slander.

**I**N an Action upon the Case for slanderous words: The declaration was, that the Defendant said of the aforesaid Plaintiff, that he is perjured, to which the Defendant pleads, that the Plaintiff another time hath brought an Action in the Kings Bench against the same Defendant for that, that he the said Plaintiff was perjured, and had cozened *John Synagat*, and that the Defendant had pleaded to all besides these words, (Thou art perjured) not guilty, and to the words (thou art perjured) he justifies that the Plaintiff was perjured in making an Affidavit in the Star-chamber, and this Issue was Joyned, and it was found for the Defendant, but it was not pleaded that any Judgement was given upon it, And *Haughton* Serjeant for the Plaintiff, which had Demurred upon the Defendants Plea, Argued that the Plea is insufficient, for as it shall be increased

*Haughton*

ded by that, that the Plaintiff was afore times barred, if it be in a real Action, it ought to be averred, that it is for the same Land, and if it be in a personall Action it ought to be averred that it is the same Debt or Trespasse, and if it be pleaded by way of Justification, then he ought to have averred also, that the Plaintiff hath taken a false and untrue Oath, upon which Issue might have been taken: But here nothing is pleaded but the Record, and nothing averred (*in Facto*) So that the Issue cannot be taken upon it, for the pleading is only of Record, and that the Defendant for the cause aforesaid in the Record afore said mentioned, spoke the said words, and this is not good, for there is not contained any cause of Justification, as in *Quare Impedit*, in the 15. and 16 H. 6. The Defendant pleads that he was Incumbent by the cause aforesaid (and without that :) But this was no good Plea, for he ought to plead his Title specially. And also it is not pleaded as *Estoppel*, for then he ought to have relied upon that precisely, as 35. H. 6. in *Replevin* the 2. v. want relies upon dissent, 30. ass. 32. 2. H. 7. 9. Also *Estoppel* it cannot be, inasmuch that Judgement was not given in the first Action; Also it is not pleaded as *Estoppel* for the Plea is concluded Judgement if Action, where he ought to have relied upon the *Estoppel*, and peradventure also the Triall was voyd by unawarding of *Venire Facias*, or other Error; So that without Judgement it can be no *Estoppel*, and so he concluded and prayed Judgement for the Plaintiff. Barker Serjeant argued for the Defendant, that the Declaration is very good, and notwithstanding that the words are generall; that is, he is perjured, yet this may be supplied very well by the (*Innuendo*) as it appears by *James and Alexanders Case*, 4. Coke. 17. a. And also that *Estoppel* by the Verdict is good without Judgement, as in Action of Debt, release was pleaded, and Issue joyned upon that, and found for the Defendant, and after another Action was brought for the same Debt, and agreed that the first Verdict was *Estoppel*, 2. Ed. 3. 19. b. c. And he cited *Baxter and Styles Case* to be adjudged in the point, that the *Estoppel* is good, and also *Vernons Case*, 4. Coke where the bringing of a Writ of Dower, Estopped the Wife to demand her Joynture, and so concluded and prayed Judgement for the Defendant: Coke, the Count is good being of the aforesaid Plaintiff, and may after be supplied by (*Innuendo*) though that the words after are generall; But if the words were generall, that is, He is perjured, without saying that the Defendant spoke of the aforesaid Plaintiff, these English words following (*Videlicet*) he (*Innuendo*) the Plaintiff is perjured, this is not good, and shall not be supplied by (*Innuendo*) and he said that another time convicted is a good Plea in case of life without Judgement; but this is in favour of life, but in trespass

Barker.

Perjured Assi-  
onable.

passé it ought to be avowed, that it is the same Trespasse, and also there ought to be Judgment, and the Defendant ought to relye upon that as an Estoppel, and agreed by all that Judgment should be given for the Defendant, if cause be not shewed to the contrary such a day, &c.

*Michaelmas, 1611. 9. Jacobi, in the Common Bench.*

*Hall against Stanley.*

*Trespasse for  
imprisonment*

*Dodridge.*

**I**N Trespasse for Assault and Imprisonment, the Defendant justifies, insomuch that the Action upon the case was begun in the *Marshalsey* for a Debt upon an *Assumpsit* made by the Plaintiff, and that upon that *Capias* was awarded to this Defendant being a Minister of the said Court to Arrest the Plaintiff to answer in the said Action, and that he by force of that Arrested the Plaintiff, and him detained till the Plaintiff found suerties to answer to the said Action, which is the same assault and Imprisonment: To which the Plaintiff replied, that none of the parties in the said Action were of the Kings household, and so demanded Judgement, upon which the Defendant Demurred in Law: And *Dodridge* the Kings Serjeant for the Defendant, that the Court of *Marshalsey* may hold Plea of Actions of Trespasse, by the parties or any of them of the Kings house or not, and he intended that the Jurisdiction at the Common Law was generall, and then they have Jurisdiction of all Actions as well reall as personall, and though that their Jurisdiction be in many cases restrained, yet in an Action of Trespasse there is not any restraint, but at this day they have two Jurisdictions: That is, in Criminall cases, and also in Civil causes, within the Virge: See *Fleta* book the second and third, where he describes the Jurisdiction of all Courts, and amongst them the Jurisdictions of this Court, and also *Briston* which wrote in the time of *Ed. 1. lib. 1. chap. 3.* which saith it was held before *Bygott* who was then Earle of *Norfolke* and Marshall, and their Authority and Jurisdiction was absolute and their Judgements not reverfable unlesse by Parliament, and this appeares by the *Statute* of *5. Ed. 3. chap. 2.* that they might hold Plea of things which did not concerne them of the household, and also the words of the *Statute of Articuli super chartas chap. 3. 28. Ed. 1.* provides that the *Marshalsey* shall not hold Plea of free hold of covenant, nor of any other contract made between the Kings people, but only of Trespasse made within the Kings house or within the Verge, and of such Contracts and Covenants which one of the house made with another of the house and within the house and in no other place, where Trespasse is Limited to the Kings house



house or within the Virge, but no restraint that the parties shall be of the Kings House, or otherwise it shall not be intended which shall be only those which are of the Kings House, insomuch that the Trespasse is limited to be made within the Virge, also he sayd it was a statute made 30 Ed. 1. which provides, that if any causes arise amongst the Citizens of London only, that this shall be tryed amongst the Citizens; but if it be between them of the House, it shall be tryed by them of the House, by which it appears that they may hold plea between Citizens of London, where none of the parties are of the Kings House, also the statute of 6 Ed. 3. chapter 2. provides that in Inquests they shall be there taken by men of the Country adjoining, and not men of the Kings Household if it be not betwixt men of the Kings Household if it be not for Contracts, Covenants and Trespasses made by men of the Kings Household of one part, and that the same House which refers to the statute of *Articuli super chartas* before cited, and this expounds, and so the Statute of 10 Ed. 3. chapter 2. provides that in Inquests they are to be taken in the *Marshalsey*, that the same inquests shall be taken of men the Country thereabouts, and not by People of the Kings House, if it be not of Covenants, Contracts, or Trespasses made by people of the same House, according to the Statute made in time of the Grand-Father of the said now King, and according to that the use hath been, that is, if none of the parties were the Kings house then the tryal had been by the men of the country adjoining. And if one of the parties be of the house, and another not, then the tryall is by party Juries: and if both the parties be of the house, then all the Jury hath used to be of the house; and if the Cause be between Citizens of London, then the tryall hath used to be by Citizens of London, and in the Book of *Enuries*, the same plea was pleaded in false Imprisonment, 9; 10. and the Register, fol. 111. A. in action upon escape in Trespasse, and to the Books of 7 H. 6. 30. 10 H. 6. Long, 5 Ed. 4 19 Ed. 4. 21 Ed. 4. He saith, that none of these Books are in action of Trespasse but one onely, and that is mistaken in the principall point, and so may be mistaken in one by case: And the Broke of 10 H. 6. 30. is directly in the point; but Brooke in abridgement of that saith, that the practise and usage of the Court was otherwise: But it may be objected that this is (*Indebitatus assumpsit*) which is in nature of an action of debt, and founded upon contract; he said that *Fitzherbert* in his *Natura Brevium* said, that there are two sorts of Trespasses, that is, General, and upon the Case, and Trespasse is the *Genus*, and the other are the *Species*, and that the action is founded upon breach of promise, which is the Trespasse, as for not making of a thing, which he hath promised to doe, and it is *Majestale breve*, and not *breve formarium*, and so is an action of *Trover*.

*Trover* and *Conversion*, or *Assumpsit*, are Writs of Trespasse; but admit that no, yet action of false Imprisonment doth not lye, for hee ought not to dispute the authority of the Court; for the duty of his Office is only to be obedient and diligent, for otherwise he should be judged of the Judge: And who by the appointment of the Judge doth any thing, doth not seem to do it deceitfully, because it is of necessity he should obey; and 14 H. 8. 16. a Justice of Peace awarded a Warrant to arrest a man for suspicion of Felony, where his Warrant was void, and yet the party to whom it was directed, justifies the making of the Arrest by force of that. And 12. H. 7. 14. *Capias* was awarded to the Sheriff without original, & yet it was a sufficient Warrant to the Sheriffe: and 22 *Affis*. 64. Court awarded a Warrant, where they had no Jurisdiction, and yet it was a sufficient Warrant for him to whom it was directed. And so in *Mansells* case, if the Sheriffe execute an (*habere facias seisinam*) awarded upon a void Judgment, this is a sufficient Warrant for him. So in this case allowing that the Court hath no Jurisdiction, yet the *Plaintiff* cannot be retained by this action, but is put to his Writ of Error, or to his action upon the *Statute*, and so he concluded, and prayed Judgment for the *Defendant*.

Hutton.

Hutton Serjeant for the *Plaintiff* argued to the contrary, and hee intended that Judgment should be given for the *Plaintiff*, for the matter, and also for the Parties, and that the Judgement, and all other proceedings in the Marshalsey were meerly void; and he denyed that they had originally such absolute jurisdiction, as *Fleta* pretended, for originally that was only for the preservation of the peace, as it appears by the stile of the Court, and also by the diversities of the Courts, and that Criminall causes which require expedition, are there only tryable, and that civill causes are inroached of later times, and it was necessary to be restrained and reformed by *Parliament*: And it appears by the *Statute* of *Articuli super Chartas*, that they have encroached to hold plea for free-hold; and for that the Court which is mentioned in *Fleta*, cannot be otherwise intended then the Kings Bench, which then followed the Kings Court. And also that they have not inroached only upon matters, as to hold plea for Freeholds, but also to persons and place where Contracts and Trespasses were made, and this was the cause of the making of the said *Statute*. And to this action of Trespasse for *indebitatus assumpsit* there began, he intended that it is for another thing, of which they could not hold plea, and it might be criminall; for Civill is that which begun by contract, and it is part of the commutative Justice, for which is recompence given by one party to another, and is not founded upon the *Contract*, but is translated to an action of Trespass, which manner of Trespass is not within the *Statute*; and so he intended, that for the matter

matter it is not within the *Statute* : and then for the persons also , he intended that it is not within the *Statute* , and this appears by the words of the *Statute* of 28. *Edw. 1. Articuli super Chartas* , and to that 10. H. 6. 130. it is adjudged that Judgement in such case there given is void, and *Coram non Judice*, so 7 H. 6. 30. expresses the cause to be, inasmuch that none of the parties are of the household of the King, 4 H. 6. 8. 19 *Edw. 4*. 8. 5 *Edw. 4*. 32 H. 6. *Ret.* 27. And he cyted also *Michalburns* Case to be adjudged upon a Writ of Error, in the Kings Bench, 38 *Eliz.* That they could not tender a Plea in *Trespasse* for *Trover* and *Conversion* , if none of the parties were of the Kings house : and further he said , that when a Court hath Jurisdiction, and errs in matter of proceedings, or in Law , there the Execution made by force of their Process shall be lawfull. But where the Judgement is void by default of Jurisdiction, as in this Case, there it is otherwise, as 10 H. 6. 13. Recovery of Land in the Spirituall Court is void; so *Formedon* commenced, &c Judgment given upon that before the Judges of Assises void. So 36 H. 6. 32. Recovery of Land in *Wales* in this Court is void ; and 8 *Edw. 4*. 6. Recovery of Land in ancient demesne is avoidable by Writ of *Deceit* ; But in the other cases before , the Judgment and Recovery is absolutely void, and (*Coram non Judice*) for default of Jurisdiction : So in 9 H. 7. 12. *b.* Recovery of Land in *Durham*, *Chester*, or *Lancaster*, here is void for the same cause : And in this case also the said *Statute* makes that void by expresse words, see the *Statute* of *Articuli super Chartas* , Chap. 3. And to the case of 14 H. 8. before cyted, of Warrant awarded by Justice of Peace ; he agreed, that inasmuch that the Justice of Peace had Jurisdiction of causes of Felony, and erred only in the forme and manner of his proceedings , and so in all the other cases which were put of the other part. And also hee agreed that a Writ of Error may be well maintained, if such Judgement which is void, as it was in *Michalburns* case, for the party may admit the Judgment to be but voidable if he will. And to the exceptions to the pleading, that is, that the authority is not prosecuted, 1 *Posse*, that is, such a day, which was before the Judgment, and yet it seems good ; and that in the first the authority was very well prosecuted in the 2 *Posse* was sufficient, and the other words, that is, (such a day) is but surplusage, and so he concluded, and prayed Judgment for the Plaintiff, and it was adjourned.

*Coram non judice.*

Judgement void.

Michael.



*Michaelmas 1611. 9. Jacobi, In the Common Bench.*

*Peto against Checy and Sherman and their Wives.*

*Trin. 9. Jacobi, Rot. 1151.*

**I**N Trespasse and *Ejectione firme*, the *Defendants* pleaded, that one of the *Defendants* made agreement with the *Plaintiff* for the said Trespasse and Ejection with satisfaction, and demands Judgment, if action, upon which the *Plaintiff* demurred in Law; and it was argued by *Nicholls* Serjeant for the *Plaintiff*, that the agreement was no plea, though it be said by *Keble* in the 11. H. 7. 13. That though it be a Plea in Ravishment of Ward, *quare Impedit*, and *quare ejecit infra terminum*, inasmuch that they are actions personall: But *Wood* denied that, inasmuch that Inheritance is to be recovered, and in *Ejectione firme* term shall be recovered; and for that it shall not be spoken, and of this is *Wood* expressly in the 13. H. 7. 20. b. That in *Ejectione firme* agreement shall not be a plea, inasmuch that the term is to be recovered, which is the thing in demand. And there also it is agreed, that in Waste brought against Lessee for yeares in the *Tenet*, agreement is good plea, and so *Yavasor* intended, if it be in the *Tenet*, but not if it be brought against Lessee for life: And also he intended that by Recovery in *Ejectione firme*, more shall be recovered then the term only, for by that the reversion shall be also reduced, and for that the Inheritance is drawn in question; and it is said in 11. H. 7. 13. that it shall not be a plea in *Assise*, inasmuch that there the Free-hold is to be recovered, and by the same reason hee intended that shall be no plea, inasmuch that more is to be recovered then in *Assise*, for there the Tenant only shall recover the free-hold, and his damages; but here the Term and the Inheritance also are reduced and revested: And this is the reason also which is given in 11. H. 7. 13. b. by *Fisher*: That if a man make a Lease for years, rendering Rent, and after brings Debt for the Rent behind, the *Defendant* cannot wage his Law, notwithstanding that the action is personall: But this is more high in his nature, as it is there said, and yet there nothing shall be recovered, but only damages, for which a man may have satisfaction. Also he intended that it was not well pleaded; that is, that such agreement was had between the *Plaintiff*, and one of the *Defendants*, and betwixt those shall be intended those two only, and also *Ipsum* and *Alios* by his commandment, and doth not shew that this was made by the other two by his commandment, and so he concluded, and prayed Judgment for the *Plaintiff*.

*Shirley.*

*Shirley* Serjeant for the *Defendants*, that the Plea is good, and that the

the nature of the Action is only Trespasse by force and arms, and differs from a *Quare ejecit*, but *Ejectione firme* differs from *pre- dict. infra terminum*, and lyes against the immediate Ejector; but *Quare ejecit* lyes against him which hath title, as he in reversion, 7 H. 4. 6. b. *Ejectione firme* was brought by *Executors* of Land let to their Testator for years, upon outring of the Testator by the Statute of 4 Edw. 3. Chap. 6. which gives action for the *Executors* of goods taken out of the possession of their Testator: and it seems to him also that proces of Outlawry lyes in an *Ejectione firme*, but in *Quare ejecit infra terminum* only summons. So it is 11. H. 7. 13. There is a great difference between *Writ* and this; for there the Proces is Distress, and other speciall Proces: But so is it not here, but only the Proces which is in other generall actions of Trespasse, and so is the expresse opinion of *Keble*, in 11. H. 7. 13. That in ravishment of Ward, *Quare impedit*, and *quare ejecit infra terminum*, that agreement is a good plea, and yet all these trench upon the Realty; and in *ejectione firme*, if the term expire, hanging the action, this shall not abate the Writ; but the *Plaintiff* shall have Judgement for his damages, otherwise in a *Quare ejecit infra terminum*. And it was resolved so *Eliz.* That if an *ejectione firme* be brought at the common Law of Lands in ancient Demesne, that this shall not alter the tenure, inasmuch that it is merely personall; and the damages are the principall which are to be recovered; and in 21 Edw. 4. 10. b. the difference is shewed between *ejectione firme* and *quare ejecit infra terminum*, for one lyes against the lessor, or other Ejector immediately, and the other lyes against the Feoffee of the other immediate Ejector, and the first is by force of armes, and the other not, and it shewes lyes against him that is in by Title, and the first against him which in the wrong doer, and he intended that the agreement with one of these *Defendants* is good, for it is satisfaction, and discharges the action as release, the which every one which hath it may plead; and here is pleaded with satisfaction, that is obligation, upon which the *Plaintiff* may have action, and so he concluded and prayed Judgement for the *Defendants*.

*Wynch* Justice argued this case, notwithstanding that hee had not heard any argument at the Barr, this being the first case that he argued after he was made Justice of this Court, and he delivered his opinion that the agreement was a good Barre, and he said, that the difference is where the thing to be recovered is in the Realty, and where it is in the Personalty, as it is agreed in *Water Case*, 6 Coke 43. b. So that here the only question is if this action be in the Realty, or in the Personalty, and it seems to him that it is in the Personalty, and that it is of the nature of Trespass, and the term is not anciently to be recovered, as it is 6 R. 2. *Fitz. Na. Bre.* and it is within the Sta-

1001 of 4 Edw. 3. Chap. 6. which gives action to Executors for goods carried away in the life time of the Testator, as it is 7 H. 4. 6. b. And to objection, that ancient Demesne is a good plea, and for that is in the Realty, and hee said, and so it is in Accompt, and Accompt is not in the Realty; and the reason why it shall not be a Barr in Assise, is in so much, that there the Free-hold shall be recovered, but this fails here: so in Waste also this toucheth the Inheritance; but here the Inheritance doth not come in question, but the term only; and it doth not appeare to the Court, that it concerneth Inheritance, for it may be betwixt the Lessor or another which claims under him, and the Lessee. And if a Husband which hath a term in right of his Wife, submits himself to Arbitrement, this shall not bind the Wife, but shall bind the Husband, and shall be a Barr, if the Wife hath not Interest, and so he concluded that Judgment shall be given for the Defendants, and that the agreement is a good Barr.

Foster.

Foster Justice intended that the agreement is a good Barr in an Ejectione firmæ, &c. And it seems that it is no question but that the action is personall, and yet hee agreed that ancient Demesne is a good plea. So in debt, receipt of part hanging the Writs abates all the Writs. And 21 Ed. 4. 10. b. Two Tenants in Common were of a Term: and 7 H. 4. 6. b. Executors shall have an action upon Entry made in the time of their Testator by the statute of 4 Edw. 3. Chap. 6. and in this the Plaintiff shall recover his Term; but he denied that the action is reduced by the recovery, nor reversed in the Lessor till the Lessee enter. And to the Objection that the Realty and Inheritance may come in question in this, that is not to the purpose, for so it may in an action of Trespasse. And he intended there is no difference between agreement and Arbitrement; and agreed that none of that is a plea where the Inheritance or Free-hold comes in question. And he conceived that Arbitrement for free-hold is not good, unless the submission be by Deed intended; for by Obligation with Condition is not sufficient, 21 H. 4. 4. b. and it is not the difference, 14 H. 4. the revivment of ward submission may be without Deed, in so much as it is in the personall, and he intended that there is no difference between that and Revivment of Ward, and Ward is but Chattell, so is term which may be sold by word, as well as the possession may be sold by word, so may the right of that be extinct by word. And as if a man be bound to pay a certain summe of money at a certaine day, and the Obligor accept parcell in satisfaction before the day, and that is very good? So in this case acceptance of a summe of less value may be a satisfaction of such personall thing, 4 H. 3. Dyer 1. 8 Edm. 6. Dyer, 19 H. 6. 94. 7. And so he concluded, that for that nothing is to be recovered but Chattell, therefore that the agreement shall be good plea.

Washington Justice agreed that the agreement should be good in Ejectione



*Ejectione Firmæ*, inſomuch that this is moorely perſonall: And he argued that it is no Plea in *aſſiſe* inſomuch that this is reall, and there the Free-hold is to be recovered, and this is the reaſon that waging of Law lieth in Debt upon arbitrement, inſomuch that the ſeale of the Arbitrators is not annexed unto it, and for that to him it is but only matter in Deed, 13. *Ed.* 4. And he intended that agreement with ſatisfaction is as much as Arbitrement, for a perſonall thing cannot be ſatisfaction for a reall thing, and that is the cauſe that it cannot be a Barr in Debt upon arrearages of accompt, inſomuch that that is founded upon Record, and is a thing certaine: And in waſt it is no Plea, inſomuch that this is a mixt Action, if it be againſt a Leſſee for life, otherwiſe if it be againſt a Leſſee for years, for a Tearme is taken in 7. *H.* 4. 6. & to be within the word (Goods,) and an Executor may have an Action upon that, (of goods carried a way in the life of the Teſtator) And though that the Hincry abate the Writ, yet this doth not prove that it is more then a Tearme, and though that the Tearme determine hanging the Writ, this ſhall not abate the Action, but the Plaintiff ſhall recover Damages; and in Ravishment of Ward, Summons and Severance lies, and the Body of the Heire ſhall be recovered, and ſo in *Quare Impediæ* Summons and Severance lies, and the preſentment ſhall be recovered and Damages, and yet the principall is but preſentment, which is but a Chattell, and for that agreement ſhall be a Barr, and ſo he concluded that Judgement ſhall be given for the Defendant, and that the agreement is a good Plea. *Coke* cheife Juſtice agreed that the agreement is a good Plea: & he thought that that ſaved of Realty, for that, that the Tearme is to be recovered, and of the perſonality in reſpect of the Damages, which are to be recovered, and that in all Actions, where money or Damages are to be recovered, (agreement) is a good Plea, as in 47. *Ed.* 3. 14 and 10. *Ed.* 3. in Debt upon a Leaſe for years, concord is a good Plea, and 7. *Ed.* 4. 23. in *Deſines* for charters it is a good Plea, and in 6. *Ed.* 6. *Dyer* 75. 25. it is a poſitive rule, that in all Caſes and Actions, in which nothing but amends is to be recovered in Damages, there an agreement with an execution of that is a good Plea, and for that in *Deſines* it ſhall be a good Barr: So in Covenant it was adjudged in *Blakes Caſe*, 6. *Coke* 43. 6. As where an Obligation is with a Condition, to pay money at ſuch a day; the payment of another thing is good, if the Obligation be to pay a certaine Sum of money: But if a man be bound in a Sum of money, to make another Collaterall thing, the acceptance of an other thing Collaterall ſhall not be a Barr, for money is to the meaſure, and the price of every thing, if a man be bound in two Horſes to pay one, acceptance of another thing ſhall be no Barr: But the acceptance of ſuch

Arbitrement.

such a Sum of money in satisfaction is good Barr, for this is the just Estimation and measure of every thing. See 12. H. 4. Where a man was bound in an Obligation with Condition, that he shall make acknowledgement of the Obligation of twenty pound to the Obligee before such a day, &c. And agreements are much favoured, for it is a Maxim and Interest of the Common Wealth, that there be an end of suits, for by Concord small things increase, and by Discord great things are consumed, and the beginning of all Fines is, *Et est Cordia talis*, &c. and the 11. of Rich. 2. Barr. 242. In Debt upon a Lease for yeares, the Defendant pleads that by the same Deed by which the Land is let, the Plaintiff grants, that the Defendant ought to repair the houses let, when they are ruinous, at the costs of the Plaintiff, and he retains the Rent for the repaire of the houses being ruinous and a good Barr. And if it be a right of Inheritance or Free-hold that cannot be barred or extinct by acceptance of another thing, though it be of other Land, as of another Mannor, as it is agreed in *Fernham Case* 4. of Coke. A woman accepts Rent out of the Land of which she is not Dower in recompence of her Dower, this shall not be a Barr. 5. Ed. 4. 22. 3. *Edm. Dyer*, and he said that the book of 11. H. 7. 23. is misprinted, inasmuch that it is reported to be adjudged. But in truth this was not adjudged, for then it would not lay in 13. H. 7. 20. the residue before 12. H. 7. 24. And in the 16. of H. 7. warranty, it is agreed that it was against Lessee for yeares. Agreement is a good Plea, otherwise if it be against Lessee for life. And if they have adjudged, 11. H. 7. 15. which was so small a time before, they would not have adjudged the contrary in 16. H. 7. and *Hilary* 6. Ed. 6. *Bendish* in wast against Lessee for yeares in the Term: Agreement is affirmed to be good Barr. And in the book of Reports in the time of H. 7. printed in time of H. 8. the year of the 11. of H. 7. there was no print at all. And he then upon that infers, that as well as a man might agree for Trees, so well might he agree for Tearme, and to the booke of 9. H. 3. 17. a. That release of one Plaintiff in an Action of wast is a good Barr, he said that this is to be understood in wast of the Tenant, and then it shall be a good Barr, see in the 12. of Ed. 4. 11. a. Two joyne in an Action of wast, and the one was summoned and severed the other recovered the halfe of the place wasted, and in the 26. H. 6. 8. Agreement is a good Barr in an Action of wast, and he intended that in all Actions by force and Armes, where a *Capias* lies at the Common Law, Agreement or Arbitrement are good Pleas, as Ravishment of Ward, which is given by Statute in lieu of Trespasse, for taking of a Ward, where a *Capias* lies at the Common Law, and Agreement was a Barr, and for that now Agreement shall be a Barr in Ravishment of a Ward.

And

And he intended that an *Ejectione Firme* which is Trespasse in his nature, and the Ejectment is added of later times: And in all their Entries, this is entred Trespasse, and severs the Trespasse from the Ejectment, and the Ejectment will vanish, and the Statute of 4. Ed. 3. chap. 6. which gives Action to Executor, of goods carried away in the life time of the Testator, extends to that which proves this to be Trespasse, for by the Statute the Executors may have *Ejectione Firme* for Ejectment made to their Testator, notwithstanding that ancient Demesne is a good Plea in that, and in the 44. Ed. 3. 22. That is called an Action of Trespasse, and so all the Entries are *De Placito Transgressionis*, and in the book of Entries, in *Mashwell* is cited to be adjudged 26. H. 6. Trin. Rot. 27. that concord is a good Plea in an appeal of mayne 35. H. 6. 30. But in an Action in the realty it is no Plea, otherwise in *Quare Impedit*, for there nothing is to be recovered, but that which is personall, and he intended that Agreement by one of the Defendants in personall Action is a good Barr, as in 36. H. 6. Barr, concord made by the friend of one of the parties was a good Barr *Statham*, Covenant accordingly, and 35. H. 6. 7. H. 7. One of the petty Jury in Attaint, pleads agreement and good, and in an *Ejectione Firme*, Lease made to try Title is not within the Statute of buying of Titles, if it be not made to great men, but to a Servant of him which hath the Inheritance, and cannot maintaine or countenance the Action, and *Bracton fol. 220.* Lessee for yeares hath three remedies if he be evicted, that is Covenant, *Quare Ejectit infra Terminum* against the Feoffee of the Ejector, or an *Ejectione Firme* against the Immediate Ejectors, and in *Ejectione Firme* the Tearme shall be recovered, as 12. H. 4. 1. H. 5. and 11. H. 6. 6. Non-Tenure is a good Plea in *Ejectione Firme*, ergo the Tearme shall be recovered, 7. Ed. 4. 6. 13. H. 7. 21 and 14. H. 7. It is adjudged that the Tearme shall be recovered in *Ejectione Firme*, and so he concluded, that the agreement shall be a good Barr, because Wise men seeke peace Fooles seeke stiles: And that Judgement shall be given for the Defendant, which was done accordingly.

*At beaelmas, 1611. 9. Jacobi, in the Common Bench.*

Mallet. against Mallet.

ANDS were given to two men, and to the Heires of their two Bodies begotten, and the one died without Issue, and the remainder of the halfe reverted to the Donor, and he brought an Action of wast against the surviving Donee of houses and Lands to him demised, and agreed that the Writ was good, but it was a question

if



if the Count shall be general, or of a halfe only, notwithstanding that both the parties were Tenants in Common of the reversion.

Michaelmas 1611. 9. Jacobi, in the Common Bench.

Ralph Bagnall against John Tucker. after 83.

**T**RINITY 9. or Michaelmasse 8. Jacobi, Rot: 3648. The Case was, Copy-holder for life, remainder for life purchaseth the freehold and levies a Fine with Proclamations made five yeares past, and then he died, if the remainder were bound by the Fine or not, was the question, and it seemes that it shall not be Barr, for he is not turned out of possession in right. So if a man hath a Lease for remainder for yeares and the first Lessee for yeares purchase the freehold, and levie a Fine with Proclamations, and five yeares past, this shall not barr the remainder for yeares, insomuch that this was Interest of a Term, and remains an Interest as it was without any alteration, and it was not turned to a Right. And yet it was agreed that the Statute of buying of pretended rights extends to Copy-holds: See *Lessures Case* 3. Coke 125. See *Pasthe* 1612. for the Judgment.

Note if an Attorney of this Court be sued here by Bill of Priviledge, he ought not to find Bayle: But if he be sued by Original, and comes in by *Capia*, then he ought to find Bayle.

In covenant upon a Lease made by the Dean of *Norwich*, Predecessor to the Dean that now is, and the then Chapter of the Foundation of *Ed. 6.* King, for injoying of Land devised to the Plaintiff for three Lives discharged of all incumbrances, and also to accept surrender of the same Lease, and to make a new, and for breaking of covenant, the same Dean and Chapter in such a yeare of the Reigne of *H. 8.* had made a lease for yeares not determined, by which the lands devised were incumbered, upon which the Defendant demurred. And *Hutton* Serjeant for the Defendant argued, that the Lease was by the Statute of 13 of *Eliz.* as to the successor of the Dean which made it, for that it was a Lease for yeares in being at the time of the making of that, as it is resolved in *Elmors Case* upon the Statute of 1 *Eliz.* if a Bishop makes a Lease for yeares, and after makes a Lease for life: the Lease for life is void to the Successor, and so it is in the case of Dean and Chapter, and though that the words of the Statute are generally that such a Lease shall be void to all intents, purposes, and Constructions, yet he intended that it shall not be voyd against the Bishop himselfe, as it was resolved in the case of the next Advowson by

Lease by the  
Dean and  
Chapter of  
Norwich.

Hutton.

by the Bishop in *Simptons Case*, cited in *Lincolns Colledge Case* 3. *Coke* 59. 2. And he intended if the Lease be voyd against the Succel-  
 for that then the covenants also are void, as it is agreed in the 28 H. 8.  
 28. *Dyer* 189. 190. and he cited one *Mills case* to be adjudged in the  
 29 and 30. *Elizabeth* in the Kings Bench, that if a Parson make Lease  
 and avoid by non-Residence, the Covenants also are void as well as  
 the Lease, and also he intended that the Lease for life was void,  
 inso much that it was to be executed by a Letter of Attorney, and  
 the Attorney had not made livery till after two Rent dayes were  
 past, and for that the Livery was not good, for when a man makes  
 a Lease for life rendring Rent, with Letter of Attorney to make live-  
 ry, here is an implied condition, that Livery shall be made before  
 any day of payment be incurred, and it is as much as if a man had  
 made a Lease for life, without any Letter of Attorney to make Li-  
 very before such a day there, if the Attorney do not make Livery  
 before the day, but after the Livery is void, inso much as it is  
 contrary to the Condition, so in the case here, for if Livery made  
 be after a Rent day it may be made after twenty, and so immediat-  
 ly before the end of the Tearme, and if the Rent be void, for this  
 cause the Covenants also are void, and if a man bargain and sell his  
 Mannor, and the Trees growing upon it, the Trees do not passe  
 without Inrollment, inso much that it was the intent of the parties  
 that it should so passe, and for that they do not passe without the  
 Mannor, also he intended that the Count is repugnant, inso much  
 that that contains that the last Lease for life was made in the time  
 of Ed. 6. and after by the Dean and Chapter of the foundation of  
 Ed. 6. and after that contains that the same Dean and Chapter  
 have made a former Lease in the time of H. 8. Which cannot be if  
 the Dean and Chapter were of the Foundation of Ed. 6. and for  
 that the Count ought to have contained the alteration of the founda-  
 tion, as in case of prescription, as in *Tringhams case*, 4. *Coke* 38.  
*Wya Wilds Case* 3 *Coke* 79. 2. and 3. *Phil. and Mary Dyer* 124.  
 A good Case, and he intended that a declaration ought to have  
 precise certainty, as in 8. and 9. *Elizabeth*. 254. *Dyer*, for a thing  
 which cannot be presumed, shall not be intended, as it is agreed in  
*Pignets Case* 5 *Coke* 29. a. otherwise of Plea in Barr, for that is  
 sufficient if it be good to common intent, also he intended that  
 there is variance between the Count and the Covenant, for the  
 declaration is that the Dean and Chapter covenanted with the  
 Plaintiffs, the Covenant is generall, that is, that the Dean and Chap-  
 ter covenant, and doth not say with who, and for that the Count  
 also shall not be good, and so he concluded and prayed Judgment for  
 the Defendants.

Haughton Serjeant for the Plaintiff, intended that the Covenants Haughton  
 shall

shall not be voyd, notwithstanding that the Lease is selfe voyd, & he intended that a lease made by a Parson shall be good against himself, but it shall be voyd by his death to the Successor, but a Lease made by a Dean and Chapter shall be voyd to the Dean himself, and the Covenant shall be in force, notwithstanding that the Lease be voyd, insomuch that the Covenants are collateral, and have not any dependance upon the Lease, but to the inherent Covenants, which depend upon the Lease and the Estate, as for Reparations and such like shall be voyd by the avoidance of the Lease, but he intended that Covenant to discharge the Land from incumbrances, doth not depend upon the Interest, but it is meerly collateral, and for that it shall not be voyd, and with this difference he agreed all the Cases put of the other part, as in 45 Ed. 3. 3. Lease was made to the Husband and Wife, the Husband dies, the wife accepts the Land, and shall not be charged with collateral Covenants, notwithstanding that she agrees to the Estate, insomuch that they do not depend upon the Estate, and to the Livery made after two Rent dayes incurred, he intended that Livery is good, that notwithstanding for the deferring of the Execution of a letter of Attorney shall not defeat the Lease, or other meane act which amounts to a Command, for the Lessor takes the profits in the mean time, and it is not like to *Littleton's* case, that if a man devise his land to his Executors to be sold; and they take the profits and do not make Sale, that the Heir may enter, insomuch that the Executors have not performed the Condition, and it was not the intent of the Devisor that they should take the profits in the *Interim* to their own use, and be intended that the declaration was not repugnant, for it is of the aforesaid Church, and not of the Dean and Chapter aforesayd, and also there need not such congruity, as it were the *Foundation* of the Action, insomuch that this is only Allegation of the truth of the matter, see *H. 7. 18.* For variance upon shewing in Deed, and 17 Ed. 3. 33. b. and here the aforesaid shew, that it is the same in substance though it vary in words, and though that the name is altered, yet are the same persons in substance and the same Body, and though that it be as it is intended to be of another part, yet it is but name, and the *Foundation* then is not Issuable, as if the King *H. 8.* had been the Founder and made speciall provision in the *Foundation*, that after the Time of *Ed. 6.* it shall be said to be the *Foundation* of *Ed. 6.* this shall be good, and so he concluded and prayed Judgment for the Plaintiff, see after adjudged.

M. Chaelm



Michaelmas 9. Jacobi 1611. In the Common Bench.

The Bishop of Ely.

THE Bishop of Ely granted an Office with the Fee for the exercising of that, if it be an ancient office, it is a good grant, and if the Fee be newly increased, yet *Foster* Justice thought that the Grant shall be good for the Office, and for so much of the Fee as hath been anciently granted with the Office.

Office granted by a Bishop.

Michaelmas 1611. 9. Jacobi. in the Common Bench.

Holcroft against George French.

IN an Action upon the Case upon an *Assumpsit*, if the consideration be *Executory*, then the Declaration ought to contain the time and place where it was made, and after it ought to be averred *In Facto*, when it was performed or executed accordingly, but if it be by way of Reciprocall agreement, then the Plaintiff may count, that in consideration that he hath promised for the Defendant, the Defendant hath promised to do another thing for him, there he need not that the Declaration contain time or place for the consideration, or otherwise that it is performed and executed.

But if in the first case, where it is *executory*, that is also an averment that it is executed there, if the Defendant plead *Non Assumpsit* generally, and do not plead the speciall matter, he cannot after take exception to that Count for the Default aforesayd, where he pleads specially to that, as in an action of *Trover* the Conversion ought to be averred to be in a certain place, and so in submission and Arbitrement, they are contained in the declaration, it need not to expresse any time or place certain, but if the Defendant, pleads that the Arbitrators made no award, or that the parties have not submitted themselves to their award, there the Plaintiff may reply, that the Arbitrement or Submission was made at such a place, and this was agreed by all the Justices.

Michaelmasse 1611. 9. Jacobi, in the Common Bench:

Sir Edward Puncheon against Thomas Legate.

IT was adjudged in the Kings Bench, and affirmed upon a Writ of Error in the Kings Bench, that an action upon the case upon

T

an

*Assumpsit.*

an *Assumpsit* made by the Testator is very well maintainable against the Executor, and this was for Money borrowed, and so the Court speciall, but not upon generall, *Indebitatus Assumpsit*, but is good without any averment, that the Executors have assets over the payment of Debts due by specialty and Legacies, and he sayd, that the Record of the Case of 22 H. 8. with this agrees, and that the book in this is misprinted, and so *John* Chiefe Justice who publicly reported this judgment in the Common place, sayd, which was adjudged in the 22 H. 8. in this Court.

*Writ of Right.*

Note that Land of which a Writ of Right Close lyeth, shall be assets in a Formedon, and it is a Free-hold and not a Copy-hold, and so are all Lands in ancient Demefne, 3 Ed. 3. 14 H. 4.

It is no matter what is known to the Judge, if it be not in the form of Judgment.

Pasche 1611. fol. 50.

*Haughton.*

**H** *Aughton* Serjeant for the Defendant, argued that the entry of him in Remainder is not lawfull, inasmuch that he intended not any forfeiture of the Estate tayle, and first he argued that the condition is not good, but repugnant to Law, and for that voyd, and yet he agreed that Tenant in tayl may be distrayned from making unlawfull Acts, but here the condition tends to restraine him from doing of things which are lawfull as if a man makes a Gift in tayl, upon condition that the Wife of the Donee shall not be endowed, or that the Husband of the Donee shall not be Tenant by the Curtesie, or that a Feoffee shall not take the profits of the Land, though that the profits may be severed from the Land, as in 16 Ed. 4. *Formedon* was brought of the profits of a Mill, yet the condition is voyd, inasmuch that it is against the nature of an Estate tayl, or in Fee-simple to be in such manner abridged, so if a man makes a gift in tayl upon condition, that the Donee shall not make waste, the condition is voyd, for the making of waste is a priviledge which is incident to an Estate tayle, and for that the condition restraynes the Tenant in tayle of a thing which the Law enables him to do, the condition is voyd, so a Donee in tayle upon condition, that he shall not make a Deed of Feoffment or Lease for his own life, as it is agreed in *Mildmayes* Case, so here when the condition restraynes Tenant in tayl of concluding and agreeing, the which in him is not any wrong no more then if a man should make a gift in tayl upon condition that the Donee should not bargain and sell the Land, this is voyd, inasmuch that he doth not make any wrong or discontinuance: So in the case here, for the thing which is restrayned, that is (concluding

ding & agreeing his init self a lawfull act, and also this is only the affection and qualities of the minde, that they cannot make an Estate conditionall, if an open act be not annexed unto it, but he agreed that if a man make a gift in tayle, or a Lease for life of white acres, upon condition that the Donor or Lessee shall not take the profits of Black acre, this is a good condition, for this doth no wrong, nor is repugnant to the Estate given, or leased. And secondly, he argued, that admitting it is a good condition, yet here is no act done to operate (conclusion or agreement) which might make a forfeiture, for he sayd that *Mildmayes* case was an expresse condition, that Tenant in tayl should not suffer common recovery, the which he might lawfully do at the common Law, and he was not restrained by the Statute of *Donis conditionalibus*, which was doubted till 13 Ed. 4. but here he intends that the (agreement and conclusion) in this case shall make no forfeiture, in respect that the Wife in whom the Estate, was marryed at the time of the making, and then when her Husband joynes with her, it shall be sayd the agreement of the Husband, and not the agreement of the Wife, and yet he agreed the case in, 20 H. 8. b. *Dyer* 1. that if a man makes a Lease for years upon condition, that the Lessee his Executor or Assignes shall not alien, and there if the Wife executrix, and her second Husband alien, that this shall be forfeiture, inasmuch that there the condition followes the Estate, and is inherent to it, but here the agreement is collateral and personall, and this depends upon the Estate, as if condition be that a woman shall not beate ? S. and she takes a Husband which beates him, this shall not be forfeiture, for the condition is annexed to the person of the wife, and for that the beating of the Husband shall be no breach of the condition, but the wast of the Husband is the Wast of the Wife also, for that followes the Estate and is not personall, so he agreed that acts made by a Wife married, the which she is compellable to do are good, as partition between Coparceners, as it is sayd by *Littleton*, or Administration of Goods by Executor or Administrator, or to make attorneyment, so of things made for her benefit, as accepting an Obligation, or the bringing of an action of Wast upon a Lease made by him are also good, but here the agreement and conclusion made by her and her Husband, are for the disadvantage of the Wife, and for that they are merely voyd, as to the Wife, as in 3 H. 6. 19. 50. Contract is made with the Husband and Wife and they joyne in debt upon that, and the writ abated, inasmuch that the contract to the Wife is void, and shall be intended to be made with the Husband only, and so in *Russells* case 5 Coke 27. b. It is agreed that a marryed Wife cannot do any thing, as Executrix to the prejudice of her Husband, so in 45 Ed. 3. 17. Lease was made by Husband and wife,



and they covenanted to make suerties, and after the Husband dies, and the Wife accepts the Rent, and she shall not be bound by her Covenant, insomuch that this was Colaterall to the Estate, and if it be so that the agreement made by the married Wife is void to her, then it is no agreement and by consequence no forfeiture of the Estate: Also he intended that the conclusion of the condition, for the words of the condition depends only upon the agreement and conclusion, and not upon any Act made: So that the suffering of any Act, doth not make any matter in the case, nor is to the purpose, and also the Replication relies only upon the agreement, so that the Recovery is not materiall: And he intended that it is a condition, and that it cannot be Limitation, insomuch that the words are, that the Estate shall cease, as if such person had not been named in the Will, and so that the Estate shall cease, as if he had been dead, which are words of Defeazance only and not of Limitation, for he doth not appoint the Estate to continue so long: And also the words are repugnant, for it cannot make the Estate void as if he had not been named, for this is only the office of an Act of Parliament to make a man to be dead to one, and to be alive to another purpose; and so he concluded, and praied Judgement for the Defendant: *Nicholls* Serjeant for the Plaintiff argued, that it is a matter sufficient upon which Judgement shall be given for the Plaintiff, and he first considered the words of the Condition, that is, if the devisees by themselves or by any other, shall make any conclusion or agreement, &c. This shall be a forfeiture; as in 22. H. 8. 13. *Dyer* 65. Where a Lease was made to the Husband and Wife, *Proviso* that if they are disposed to sell and alien the Terme, that the Lessor shall have the first offer, and agreed, that if that be a Condition, and the Wife survive the Husband, notwithstanding that it was not her Deed, but the Act of the Husband, she shall be bound by that, insomuch that her Estate is bound with that, and this was the pleasure of the Lessor, and she cannot hold it otherwise then it was given, and 47. *Ed.* 3. 12. If a man makes a Lease for yeares to the Husband and Wife, and after outs them, they shall joyne in a Covenant, and so 48. *Ed.* 3. 18. They joyne in a Fine, yet there the Husband only brings Debt for the money, notwithstanding that it be the Land of the Wife which was sold, and 38. *Ed.* 3. 9. If the Husband and the Wife joyne in Covenant: See 45. *Ed.* 3. 11. 6. Where they joyne in Lease, and also to make further assurance, and the Husband and the Wife also charged with that, and so in the 20. H. 6. 25. Feoffment was made to a woman sole upon condition, and after she takes a Husband, which breaks the Condition, so in 35. *ass.* 11. A woman sole makes a Feoffment upon condition to re-entfeoff upon request, and after takes a Hus-

*Nicholls.*

a Husband, and then makes request and good, and if it be so in these cases, then in this case the Wife shall not be received, to say the agreement was made against her will, and for this, see the Statute which gives *Curia in vita* to the Woman, where the words are, to whom she in her life could not contradict.

And after this agreement, if the Husband give warrant of Attorney to suffer Recovery, this is sufficient, as it is agreed in 4. Ed. 3. an. in 6. Coke 41. *Mildmayes Case* is agreed: That if a man make a Feoffment to a Husband and a Wife upon condition that they shall not alien, it is good to restrain alienation, by which it appears that if they Joyne in Feoffment, that this shall be for ever, and yet this is the Feoffment of the Husband only. So here the agreement of them, notwithstanding it is the Act of the Husband, yet inasmuch that it is against the expresse words of the Condition, this shall be breach of the Condition, and he intended that the words of the Condition amount to as much, as if he had said, that neither the Daughter sole, nor the Daughter with another Daughter, or with another person shall make agreement, and the other person of necessity shall be intended her Husband, and so this agreement by the Husband and the Wife is within the words of the Condition. And also he saith that it is argued in *Berwicks Case* 2. Coke that a married Wife may declare a use of a Fine which is levied of her Inheritance, and if the Husband declare uses, the Wife may control them. And if an Estate be conveyed with power, that the Husband with the assent of his Wife may revoke that, the assent of the Wife to such revocation is good. So if *Proviso* be, that a married Wife only without her Husband may make revocation of uses and declare new, this is good, and revocation made by the Wife, and declaration of new uses are very good, and he agreed that in matters of Record, the Husband cannot prejudice the Wife without her consent, as Warrant of Attorney upon a *Quid Turra Causa*, or *Per que servitium*, or other Act which concerns her Inheritance, as in 9. H. 6. 32. 46. Ed. 3. 11. 22. Ed. 3. 28. 29. 27. H. 8. If a married Wife joyne with her Husband in a Feoffment of her owne Land, rendering Rent, and after the Husband dies and the Wife accepteth the Rent, this shall bind her, which proves that it was her Feoffment as well as the Feoffment of the Husband. Secondly he considered the words of the Condition, which are: (Conclude and agree) Or the which he intended not to be so uncertaine, as going about, but they are Issueable and triable, as it is agreed in 5. Ed. 4. 6. Item 56. a. *Wyndes and Taylors Case*, consent to a Raviishment within the Statute of 6. R. 2. is Issueable and triable, so of consent and agreement within this Condition, for though that the words are consent and agree, yet it ought to be otherwise an

Act subsequent, that is, reconvey, suffer, or other such Act or agreement shall not be forfeiture, for to make Elopment which shall be a forfeiture of Dower, there ought first to be consent, but that is not sufficient, but there ought to be also departure from the Husband and then the Law adjudges upon all the Act. So here when it is an agreement, and another Act subsequent, which is executed, then the Law shall judgements upon altogether: and for that this agreement consists of two parts, first when the Wife upon the motion of the Husband concludes and agrees to do the Act, which is the beginning of the agreement, and then when the Husband and the Wife upon that joyned in Deed indent, as in this case, this is a confirmation and makes a breaking of the condition, and this is not like the condition in *Mylmanes Case*, where every going about ought to breake that, as if he goe to Councell to be advised upon his Estate. Thirdly he intended that the condition is not repugnant to the Estate, in respect that an other thing is to be done before the forfeiture, and after the concluding and agreeing, for the Wife remains in *Seisin* after the agreement, till the Recovery or other Act be executed. And also he argued that before the *Statute* of 4. H. 7. of Fynes: Tenant in tayl might be restrained of alienation of his Estate, for untill that he could not Barr the Issue in tayl. So at this day he intended that a gift in tayl upon condition that he shall leave a Fine without proclamations this is good, and out of the power which is given to Tenant in tayl to Barr the Estate tayl by the levying of a Fine: And levying of a Fine without proclamations is only a discontinuance, and so tortious, so when a Condition doth not extend to all acts but only to all unlawful acts, and for that it doth not extend to a Recovery for that is a lawfull Act, as it is agreed in *Shillingtons Case* 10. H. 7. 10. H. 7. 6. 7. 21. H. 7. and 28 H. 8. *Legmans Case*: If an ecclesiasticall person hath a Tearme with this condition, that he shall not alien, and after comes the Estate, which inflicts punishment upon him for keeping of a Farme, and yet it seemes it is a good condition: But so upon the *Statute* of 4. H. 7. fines: If a man hath land in tayl with condition that he shall not alien: And after the *Statute* of 4. H. 7. is made which inables him to barr the Estate tayl by fine, yet he intended that the condition should re-  
 straine him from all unlawfull Alienations: And he intended as well as such a condition annexed to a Lease for life is good, so is it being annexed to an Estate tayl, for as well as it is in one case for the preservation of the reversion. So is this in the other case, and as in 6. Eliz. Dyer 217. Grant of Rent, *Proviso* that it shall not charge the person of the Grantor, shall not extend to the Executors of the Grantor, but shall be determined by the death of the Grantor: And so as a condition that a married Wife or an Infant shall

not



not alien is good, insomuch that this is wrong, so he intended that if this were a good condition at the Common Law, that Tenant in tayl shall not alien the Estate by 4. H. 7. and 37. H. 8. doth not inable Tenant in tayl to make alienation against such condition: And it hath been agreed that if a man make a Feoffment in fee of the Mannor of D. And after makes a gift in tayl of the Mannor of S. upon condition that the Donee shall not alien the Mannor of D. this is a good condition, and in the 21. H. 7. it is agreed that if a man make a Feoffment (*Causa Matrimonij*) *Prolocuti*, and after Divorce is sued, there the free-hold shall be devolved out of the Husband without entry: And also he intended that a man might make a thing by devise, the which he could not make by Act executed, as Authority to sell his Lands to his Executors it good, and yet in all cases of Authorities by Acts executed the Authority shall cease with the life of the party: And for that there shall be one Law of devises, and another Law of Acts executed by the party in his life, as 29. *Assis. 17. and Fitz. Na. Bre. in ex gravibus querelis* last case, the particuler Estate being created by devise, ceases, and remainder takes effect: And then to the exception, that the estate shall cease and remaine to him which had the next remainder, the which is repugnant, as it was intended, and so is *Jerry and Wykes Case*: But here the words are that the Estate shall cease, as if the party to which that is limited were dead without issue from the time of the Contract and agreement, and the remainder to him which hath the next remainder, and not the Issue of him which made the forfeiture, and also this Remainder from the time of the agreement and conclusion, and not from the time of the Act executed, for then it would be too late, for then the Estate is transferred to another, as it was in the cases put by *Anders in Corbitts Case*: But here all the Estate limited to him which made the forfeiture shall be determined, and also he intended that the Reason that the Replication containes, that the parties being in actual possession are only to satisfie the words of the Condition: And so he concluded, and praised Judgement for the Plaintiffe.

In dower the *Demandant* recovered Dower of tithes of Wool and Lamb, and how execution shall be made was the question: And the Justices intended that the Sheriffe might deliver the tithes of every 3 yard land, and assign the Yard Lands in certain: But after it was conceived that this would be uncertain and unequall, and for that the Sheriffe was directed to deliver the third part of all in generall, and yet the first was agreed to be good; but onely in respect of Inequalities, as in dower of a Mill, the third Toll dist, and of a Villayne the third dayes work, as in 23 H. 8. And it was also agreed that the Sheriffe may assign this dower without a Jury.

Dower of tithes  
of Wool.

Attachment.

It was moved, if an Attachment be granted against a Sheriff in contempt after he is removed out of his Office; and the Justices intended that not, inasmuch that now he is no Officer, and for that he cannot be now typed, and without fyne they did not use to Imprison, but the Judges would be advised to see the *Presidents* of the Court in such a case.

Michaelmas 1611. 9. Jacobi, in the Common Bench.

Kemp, and Philip his Wife, James, and Blanch his Wife, Plaintiffs, against Lawrere and Trollop, and the Wife of Guille, Executrix, during the minority of the Wives of the Plaintiffs.

Executrix during nonage.

The case was, An Executrix during the nonage; for so it was, and not Administratrix, that is, shee was ordained Executrix, all the Wives of the Plaintiffs came to their full age, or were married, and then they should be Executrices. And this Executrix during the minority, brought an action of Debt, and recovered; and before Execution the women Executrices took Husbands, and brought *Satisfactions* upon the Record, to have Execution upon the Judgement against these Defendants, *Plaintiffs*, which pleaded specially that they had nothing in the Free-hold, nor in the Land, but only a lease for yeares, and that the free-hold was in another stranger, upon which Plea the Plaintiffs demurred in Law. And Nicholls Serjeant for the Plaintiffs, that there is the difference betwixt this Executrix and an Administrator during the minority, as in 26 H. 8. 7. an Administrator have Judgment, and dyes before Executrix, or he have sued out their Letters of Administration, they shall have no execution of this Judgement, inasmuch as he comes in paramount the first Administrator, and as immediate Administrator to the first Instate, as it is agreed in *Shelley's* case. So the Administrators of one Executor shall not have execution of a Judgement given for the Executor, as it is resolved in *Brudenels* case, 5 Cokes, the 9. 6. And in 21 Edw. 4. It is agreed, if two are made Joynt-Executors, and one of them dyes, the other shall be sole Executor to the Testator: and if hee make his Executor, and dyes, his Executors shall be Executors to the first Testator: And also there is in *Fox & Greibrooks* Case in the Com: that one may be Executor for certain yeares, and another after, and this differs from the other cases; for in this case all these Executors were in privity one to another: but in the other case one comes paramount the other. But here they are all made by the first Testator and the Will: And he cyted the 2 Case in the Lord Dyer, and 18, and 22, Edw. 3. there cyted, where a Purchaser brought a Writ of Error, and

Nicholls.

and was not privy to the first Record. And Grantee of a Reversion brought a *Scire facias* against Comtee of a *Statute Merchant*, alleging that he had received satisfaction. So if a Parson of a Church recovers an Annuity, and after the Church is appropriate to a house of Religion, the Sovereign of the said house shall have a *Scire facias*. And so if union be made of two Benefices, and yet in all these cases there was no privy to the first Judgement: so he in reversion shall have Error in Attaint upon Judgement against his Lessee for life, and the Reason is given in *Brudenels Case*; that is, they which may have prejudice may have *scire facias*, and it is not like where two Joynt-tenants are, and one makes a Lease for years, and dyes, the other shall have the Rent, inasmuch that he comes in by survivorship, and not in privity. But here the Executors come in in privity, as in case of two Executors are jointly, one dyes, the other which survives shall have Execution of Judgement given for them; for *Administrator* during the homage is only to the use, commodity, and profit of an Executor, and of a Testator: so that he being Executor to the Testator, he shall have execution. And to the second, that is, that the *Defendants* have nothing but for yeares, and that the free-hold is to a stranger, he intended that this is not good; yet he agreed that in *scire facias* where a free-hold is to be recovered, speciall non-tenure is a good plea, as in 8 *Edw. 4.* 19. and 8 *H. 6.* 32. but not of the contrary, and there also generall non-tenure is no plea: But here where the free-hold is not to be recovered, nor one nor the other is a Plea; for it may be averred that the *Defendant* hath a release from him that hath the reversion: and as in 14 *H. 4.* 5. in *scire facias* to accoimt against an Executor who pleads that the Testator was never his *Bayliffe* to give an accoimt, and yet it is agreed that this hath been a good plea for the first *Defendant*, and this is the reason that it was not taken, nor was allowed for a good plea in the 11 *H. 4.* 11. Inasmuch that this amounts to non-tenure; and in 44. and 45. *Eliz. Mich. Rot.* 834. it was adjudged in *Scire facias*, where the *Defendant* pleads that he was not *Tenant* of the *Free-hold*, and adjudged no plea: And so he said it was adjudged in the case of *All-soules Colledge*, in *Scire facias* to have execution of a Judgment in *Ejectione firme*: and the *Defendant* in the *Scire facias* pleads that he was but *Lessee* for years, and adjudged no Plea, inasmuch that nothing was to be recovered but only the term, and not the *Free-hold*, and so he concluded, and prayed Judgment for the Plaintiff in *Scire facias*. *Harris* Serjeant argued to the contrary, and he intended that the Return of the *Sheriffe* is void, inasmuch that the *Juris* commanded him to give notice to the *Tenant* of the Land in *Fee-simple*, and hee did not return, that those which he had returned were *Tenants* of the Land in *Fee-simple*, and

Harris.



and so these words of the *Writ* are not answered, and so no *Tenant* is returned at all.

And it is not like to the Case in 2 *H. 4.* for there the Return was according to the Exigent of the *Writ*, but here it is not so. And as the first matter he intended, and agreed, that an *Executor* of an *Executor* may sue execution had by the first *Executor*, inasmuch that he comes in in privacy. But he said, that so it is not in this case, and that there is no difference betwixt this case, and the case cyted in *Shadys* case, that is, that an *Administrator* of an *Administrator* shall not sue execution, inasmuch that he comes in paramount an *Administrator*, and accords with this Case, 2 *Edw. 3.* in the Lord *Dyer*: If two Joynt-Tenants are, and one makes a Lease for years, rendring Rent, and then the Survivor shall not have the Rent, inasmuch that hee comes in paramount him; and to the other he intended, that the special *non-tenure* is a good plea, as well in *Scire facias* to have execution of damages, as of Free-hold, as in 24 *Edw. 3.* 31. and 5 *H. 5.* 1. and 4. *H. 5.* 11. It is resolved, that in *Scire facias* speciall *non-tenure* is a good Plea, and the books of 8 *H. 6.* 31. cyted before, there is *joyn-tenuancy* pleaded to one part, and speciall *non-tenure* to the other part by Lease for years, and the question is if it might be pleaded apart: And in 8 *Edw. 4.* 14. Is *Scire facias* upon Recovery by *Writ* of Right *Perzons* in base Court, and that the *Defendants* cannot plead release of the Lessor, and so the joyning of the Mise may be forfeiture of his Estate: And he said that it was adjudged in 16 *Edw. 3.* *Scire facias* 9. that *scire facias* to have execution of a *Pyne* shall not be sued against a Lessee for years, but against him which hath the Free-hold, but where Debt or Damages are to be recovered, there it may be sued against him which hath only Lease for years, inasmuch that the possession is to be charged; and so he concluded, and prayed Judgment for the *Defendants*, and it is adjourned.

Michaelmas 1611. 9. Jacobi, in the Common Bench.

### Crogate against Morris.

Copy-holder.

Harris.

The case was this, Copy-holder prescribes to have common in the Waste of the Lord, and brings action of Trespass against a stranger for his Beasts depasturing upon the Common there, and Harv Serjeant argued that this action is not maintainable for two causes. First, inasmuch that he is a Commoner; for as it is said by *Bract* Justice, 12 *H. 8.* 2. a Commoner cannot have an action of Trespass, for the Common is not Common, but after the Commoner hath taken that, and then before that he hath taken that he hath no wrong nor damage, but the damage is to the Tenant of the Land: As if a Lessee

Lessee for years be oured, and he in reversion recovers in *Affise*, hee shall not have damage, inasmuch that the damage was made to the Lessee, and the 22 *Affise* 48. 15 H. 7. 12. b. agreed that Commoner cannot maintain action of Trespass, nor no other but the owner of the Soil, but 13 H. 8. 15. by *Norwich*, 15 H. 7. 6. 3 H. 7. 3. 24 *Edw.* 3. 42. Commoner may distrain and avow for doing damage. 2. He intended that this action is not maintainable, inasmuch that every other Commoner may also have the action of Trespass, for if it be wrong to one, it is wrong to every one of them, and so the stranger shall be infinitely punished, as in *Williams Case*, 5 *Coke*, 72. b. where it was adjudged an action of the Case doth not lye for the Lord of the *Mannor* to prescribe, that a Vicar ought to administer the Sacraments in his private Chappell, to him, his *Man-servants* and *Tenants* within the Parsonage of the said *Mannor*, and adjudged that it doth not lye, inasmuch that then every of his *Tenants* might also have an action, and so the Vicar shall be alwayes punished: So in 17 H. 7. 27. a. A man shall not have an action upon the Case for nuisance made in the high way; so it is 5 *Ed.* 4. 2. for trenching in the high way, see 33 H. 6. 26. a. accordingly; and so he concluded that the action is not maintainable, and prayed Judgement for the *Defendants*.

*Dodridge.*

*Dodridge* the Kings Serjeant, to the exception which hath been made by the other party, that the *Plaintiff* ought to averr that he hath Beasts which ought to Common there, and that his Beasts have lost their Common, that need not to be averred, but it shall be pleaded by the other party; for if he have distrayned the Beasts of a stranger, doing damage, he need to averr no more in this action, and to the other matter, and the two Objections which have been made by the other part: First, that the Commoner hath no right to the Common, till he have taken it by the mouth of his Beasts; to that he said, that the Commoner hath right to that before that it be taken by such mouth of his Beasts: and notwithstanding that it seems by the time of 24. 1. That Commoner cannot grant his Common till he have Seisin of that, yet 12 H. 8. is otherwise, and that a Commoner may have in seisin the name implies, for he hath Common with others, and a stranger which is no Commoner cannot do wrong, but this is damage to him; and he cyted *Bracton*, 430. that there are two forms of *Writ*. 1. *Curfory Writ*. 2. *Commanding Writ*. The first of these which are formed, and are of course, and the others such of which there is no form, but are to be formed by the Masters of the *Curfory*, according to every particular Case: So that there is not a *Writ* for that, but that the Law affords a *Writ* and remedy for that, as in 28 *Edw.* 4. 23. *Admonition upon the Case made against an Officer, which gave privilege to one of his servants, while that was his servant: and it is liable to the Case for it* H. 4. 47. a. where a Schoolmaster brings

brings an action upon the Case against another for erecting of a School in the same Towne to his damage, but this was damage without Injury. But here the Commoner hath received wrong and damage; but yet he agreed that the Commoner could not have action of Trespass, because he broke his Close, for that is proper for the owner of the Soile. But it hath been agreed to him, that he might distrain them, doing damage; and the reason of that is, inasmuch that he hath received damage, and amends may be tendered unto him in recompence of his damages, without any regard to other Commoners, as it is agreed in 24 Edw. 3. 42. And to the Objection, that if one Commoner may have action, then every Commoner may have the action, and so the stranger shall be infinitely punished. And to that he said, that a Publique losse and private; and when the publique wrong includes private damage to any man, there he to whom the private damage is done may have action: And he said, that the Register contains many Writs for publique wrong, when that is done to private men, as fol. 95. A man fixes a pale, crosse a navigable River, by which a Ship was cast away, and the Owner maintained action of Trespass: And fol. 97. A man brought Trespass against one which cast dung into a River, by which his Meadow was drowned; so if the River be infected with watering Hemp or Flax, he which hath fishing there may maintain action of Trespass: and 1 H. 4. 11. Action of Trespass by one for ploughing of Land where one had a common way; and so it is in H. 7. 17. One brings an action of Trespass against another for cutting a Lyme Kill where many others are annoyed by that: So by an assault made upon a servant, the Master and servant also may have severall actions; and so in the other cases many may have actions, and yet this is no reason to conclude any one of them, that hee shall not have his action, for in truth those are rather actions upon the Case, then actions of Trespass, for the truth of the Case is contained in the Writ. Also in this case it doth not appeare that there are any other Commoners which have Common there, and for that this Objection is not to the purpose: and it appeares by Heisman and Crutche Case; 4 Cok 31. That Copy-holder shall have Common by prescription in the demesnes of the Lord, and so he concluded, and prayed Judgment for the Plaintiff.

Coke.

Coke cheife Justice said, that it was adjudged in this Court, Trin. 13, 41. Eliz. Rge. 293. b. between Maltan and Lovell, where Lovell brought an action upon the Case, in this Case, against a stranger which pleads not guilty, and it was found by verdict for the Plaintiff, and it was after adjudged for the Plaintiff, for inasmuch that the Plaintiff may take them damage season that proves that he hath wrong, and this is the reason that he may distraine (doing damage.) And by the same reason, if the Beasts are gone before his coming,



ming, he may have action upon his Case; for otherwise one that hath many Beasts may destroy all the Common in a night, and doe great wrong, and shal not be punished: and it is not like to a Nuisance, for that is publique, and may be punished in a *Leet*; but the other is private to the *Commoners*, and cannot be punished in another place nor course: and he also cyted one *Whitchards* case to be adjudged, where many *Coppy-holders* prescribe to have *Loppings* and *Toppings* of *Pol-Lords*, and *Husbands* growing upon the Waste of the Lord, and the Lord cuts them, and one *Coppy-holder* only brings his action upon the Case, and adjudged that it was very well maintainable, notwithstanding that every other *Coppy-holder* may have the same remedy. And he said also, that so it was adjudged in the *Kings Bench*, *Hillary 3 Jacobi* *Est.* 1427. in *George England's* Case: And 2 *Edw. 2. b. Covenant* 49. If a man *Covenant* with 20. to make the Sea banks with A. B. and every one of them, and after he doth not doe it, by which the Land of two is drowned and dammished, and they two may have an action of *Covenant* without the others. *Quere*, for it seems every one shall have an action by himselfe. But *Foster* and *Wynch* Justices seemed that the *Plaintiffe* ought to sue in his *Court*; that the Beasts of the stranger escaped in the *Common*, or were put in by the Owner, for it may be they were put in by the Lord which was owner of the Soile, or by a stranger. In which case the Owner of the Beasts shall not be punished. But *Fake* and *Warburton* seemed the contrary, and that this ought to be averred and pleaded by the *Defendants* in excuse of the *Trespasse*, as in action of *Trespasse* (why he broke his Close) And so it was adjourned. See *Goswold's* case, 490. see *Judgment*.

*Feby 1612. 10. Jacobi, in the Common Bench.*

*Henry Higgins against George Biddle.*

*In* the *Defendants* under *Writ* as *Bayliffe* to *Sir Thomas Fitzherbert* and *Dorothea* his Wife, intimating that *Isabel Biddle* was a sister of the place where, &c. in their demerits of Fee, and so seized the first of *June*, 25 *H. 8.* gives this to the Lord *Anthony Fitzherbert*, and *Maud* his Wife, and to the Heirs males of their bodies, which have since *Thomas Fitzherbert*, Knight, *John Fitzherbert*, and *William Fitzherbert*, *Anthony* and *Maud* dyed, and the said place where, &c. was allotted to *Sir Thomas Fitzherbert* as Heire to the *Dones* to the Intail: and the said *Thomas Fitzherbert* the 1. of *April*, 6 *Edw. 6.* of that enclosed *Manor* *Smitherton*, *Ralph Cotes*, and *Roger Baily*, to the use of *William Fitzherbert*, and *Elizabeth* his Wife for their lives, and after to the use of *Sir Thomas Fitzherbert*, and the heirs of his body; the remainder to the use of the

*Replevin.*

the right Heirs of the said *William Fitzherbert*: *William Fitzherbert* dyed, *Sir Thomas Fitzherbert* disseised the said *Elizabeth*; and the said *John Fitzherbert* had Issue, *Thomas*, and dyed, & *Sir Thomas Fitzherbert* dyed without Heir of his body, and the said place where, &c. descended to the said *Thomas* as Cousin & Heir of the said *Sir Thomas*, and Son an Heir of the said *John Fitzherbert*, which enters, and was seised to him and to the Heirs Males of his body, as in his Remitter. And the said *Thomas Fitzherbert*, 4 of Novemb. 39. *Eliz.* by Indenture of Bargain and Sale enrolled in the Chancery within six moneths, bargained and sold the said Land to *Sir William Leighton* & his heirs, and *Sir William Leighton*, 5 of Novemb. 43. *Eliz.* by Indenture enrolled within six moneths for 4000. l. bargained and sold the said land where, &c. to *Sir Thomas Leigh*, and Dame *Katherine*, as aforesaid, and so avowed the taking for doing damage. And the Plaintiff for Barr to the said Avowry, pleads, that well and true it is, that the said *Sir William Leighton* was seised of the said place where, &c. in his Demesne as of Fee, as it was alledged by the Defendant. But further he saith, that the said *Sir William Leighton* so being thereof seised, 1 Decemb. 44. *Eliz.* enfeoffed the Plaintiff in fee, and by force of that the Plaintiff was seised, and put in his Beasts into the said place where, &c. without that, that the said *Sir William Leighton* bargained and sold the said Land in which, &c. to the said *Sir Thomas Leighton*, and *Katherine* his Wife, as in the Consuance hath been alledged by the Defendant, upon which the Defendants joyn Issue; and it was agreed by all the Justices, that notwithstanding this admission of the Parties, is an Estoppel by the pleading, yet as well the Plaintiffs as the Defendants were admitted to give another evidence to the Jury against their own pleading: that is, that *Sir William Leighton* was not seised, and so nothing passed by the bargain and sale; and also that *Sir Thomas Fitzherbert* had the possession by acceptance of the surrender of the estate conveyed to *William Fitzherbert* and his Wife, notwithstanding it was admitted, by pleading, that he had that by Disseisin. And all the Justices agreed, that the Jury shall not be concluded by the pleading of the parties, in so much that they are sworn to speak the truth.

*Plac. 1612. 10. Jacobi, in the Common Bench.*

*Brook v. Riddle, against Riddle.*

IN Writ the Plaintiff assigns waste in cutting down of 20. Oaks in such a Close, and 40. Oaks in such a Close, &c. Upon the Evidence it appears that the said Oaks were remaining upon the Land for standing according to the Award; at the last falling of that, and they were

Waste.

were of the growth of 16. or 20. years, and that tithes were paid for it. And it was agreed by the Lord Coke and all the Justices, that this was no Waste, inasmuch as was felled 40 Acre wood: And it was said by the Lord Coke, that though it be of the age of 20. or 24. years, yet if the use of the Parties be to fell such for seasonable Wood, this shall not be Waste; and if Tithes be paid for that, it appears that it is no Timber.

### Doctor Manning's Case in the Star-chamber.

ONE *Gidding* as an Informer, and not as party grieved, exhibits his Bill in the *Star-chamber* against Doctor Manning, Chancellor to the Bishop of *Exeter*; for Extortion, Oppression, and other offences. It was resolved, that when a Bill contains any particular offences, and after the same Bill contains generall words, which includes many offences of the same kind; And the Plaintiff proves the particular offences, he may examine other particular offences also included within these generall words, in supplement and aggravation of the particular offences contained in the Bill; and if they be proved, the Court will give the greater and high sentence against the Defendant in respect of them, notwithstanding that they be not particularly expressed in the Bill. But if the Plaintiff hath not proved any of the offences particularly expressed in the Bill, the Defendant shall not be censured by the particulars grounded upon the generall words of the Bill. And if a man which is not party grieved, exhibite Bill for offence made to another person; as against whom the offence was committed, he shall not be allowed as Witnesse, inasmuch as he is party grieved, and by that he should be a witnesse in his own Cause.

*Informer.*

*Pasche 1612. 10. Jacobi, in the Common Bench.*

William Peacock Plaintiff, against Sir George Raynell.

IN the *Star-chamber* the Plaintiff exhibits his Bill against the Defendant for Libellous and Infamous Letters, the which was in this manner. The Plaintiff being Heire generall to Richard Peacock which was of the age of eighty six yeares, and had Lands of Inheritance to the value of 800. pound per annum, and the Defendant had married the Daughter of Sir Edward Peacock, which was a yonger brother of the said Richard Peacock, and the said Defendant perceiving that the said Richard Peacock, had purpose to settle his Inheritance upon the said Plaintiff, and intending to remove the affection of the said Richard from the Plaintiff, and to settle that in himselfe,

*Lybell.*



himselfe, writes a Letter to the said *Richard Peacock*, containing that the Plaintiff was not the Son of a *Peacock*, and was a hunter of Tavernes, and that divers women had followed him from *London* to the place of his dwelling, and that he did desire to heare of the death of the said *Richard*, and that all his Inheritance would not be sufficient to satisfie his Debts; and many other matters concerning his Reputation and Credit, to that subscribed his name, & this ensealed & directed to the said *R. Peacock*: And it was agreed that this was a Libell, and for that the Defendant was Fined to two hundred pound, and Imprisonment according to the course of the Court: And the Plaintiff let loose to the Common Law for his recompence for the Damages he hath sustained: But if the Letter had been directed to the Plaintiff himselfe, and not to the third person, then it should not have been a Libell, or if it had been directed to a Father, for Reformation of any Act made by his Children, it should be no Libell, for it is not but for Reformation, and not for Defamation; for if a Letter containe scandalous matter, and be directed to a third person, if it be Reformatory and for no respect to himselfe, it shall not be intended to be a Libell, for with what mind it was made is to be respected: As if a man write to a Father, and his Letter containe scandalous matter concerning his Children, of which he gives notice to the Father, and advisech the Father to have better regard to his Children, this is only Reformatory without any respect of profit to him which wrote it: But in the first case the Defendant intended his profit and his owne benefit, and this was the difference.

*Pasche 1612. 10. Jacobi, In the Common Bench.*

*Randall Crewe against Vernon.*

**I**N the Star-chamber it was resolved: That if the Defendant do not performe the Sentence of the Court, as here he was to make acknowledgement of his offence committed against the Court of Exchequer at *Chester*, and this acknowledgement was to be made at the great Assises at *Chester*, and he did not performe the Sentence, and yet the Defendant could not be fined for this contempt, but only Imprisonment, and for that he was committed close Prisoner till he performed it: But he could not be fined, inasmuch there was not any Bill, upon which this Sentence should be founded.

*Pasche*

*Pasche 1612. 10. Jacobi, in the Common Bench.*

*Charnocke against Corey, See before.*

**I**N Debt against Administrator: The Defendant pleades two Recognisances acknowledged by the Intestate, which were not satisfied, and that he had not any Goods or Chattrells of the said Intestate, unlesse Goods and Chattrells which did amount to the Debts due by the said Recognisances: And it seemed to all the Iustices, that the Plea was not good: But that the Defendant ought to plead according to the Common forme, that is, that he hath no Goods besides or beyond the Goods to satisfy the two Recognisances, or that he hath no Goods to such value, which do not amount to the said Sums due by the two Recognisances: And in these cases this manner of pleading is implied, confession that he hath Goods of such a value, and so they should be assets if the Recognisances be discharged, or remaine of Covin and fraud to deceive Creditor.

*Debt against  
Administrator.*

*Pasche 1612. 10. Jacobi, in the Common Bench:*

*Bicknell against Tucker, see before 73.*

**T**HE Case was: A Copy-hold Estate was granted to one for life, remainder to another for his life, the first Copy-holder for life, accepts a Bargaine and Sale of the free-hold from the Lord, and after that levies a Fine with proclamations, and five yeares passe, and then he dies, and if this Fine shall be a Bar to him, which hath the Copy-hold Estate for life in remainder was the question: And it was argued by *Harri Serjeant*, that the Estate of Fines in the body of that binds all persons, but onely some which have Infirmitie, and by the saving Rights, Titles, Claimes, and Interests are saved: But Title comes in the conditionall perclose of saving, that is, so that they pursue their Title, Claime, and Interest, &c. By way of Act or lawfull Entry within five yeares next after the said proclamations had and made: So that in this case the principall matter to be considered is what thing is operated by the acceptance of the Bargaine and Sale, for if by that the remainder of the Copy-holder be turned to right, then it ensues that the Fine shall be a Bar: And it seemes that this determines the first Estate for life, and he agreed that it cannot be a surrender, inasmuch that there is a reserved remainder, as it is 37. H. 6. 17. & 4. H. 7. 10. But this Lease to commence at a day to come cannot be a surrender, but shall be determined

terminated and extinct by acceptance of a new Lease, as it is there, and in 22. H. 7. 31. a. agreed and so it was adjudged in *Hillary* 30. *Eliz.* between *Wilmott and Cutlers Case*, that if a Husband which was seised of a Copy-hold Estate in right of his Wife, accept an estate for life, this determines the copy-hold Estate which he hath in right of his Wife in possession: So if Lessee for years accept an estate of one which hath no Estate, yet this determines his Term, as it was adjudged *Hillary* 31. *Eliz.* Rot. 1428. b. That if Lessee for years of a Lease made by the Ancestor accept an estate of *Guardian in Socage*, this determines his Lease, which he had of the Ancestor, and upon that he concluded, that in this case the acceptance of a Bargain and Sale, turns the Copy-holder in remainder to a Right, and then it appears by *Jassim Case* 1. *Coke* 127. That he shall be bound though that he hath only Interest, and so of Title also, and he said that it appears, by *Kiro and Quarintons case*, 4. *Coke* 26. a. that a Right or Title may be of Copy-hold Estate, for it is there said by *Waycheife Justice*, that it shall be with in the *Statute of 32. H. 8. chapter 9.* of Baving of Title; and so concluded.

*Dodridge* the Kings Serjeant agreed, that the sole question is if any thing be here done to turn the Copy-hold-Estate in remainder into a right, for then he agreed that this shall be barred, otherwise not, and to that he intended, that the first Estate for life shall be said to be in *Eff*, notwithstanding the acceptance of the Bargain and Sale, as to all estrangers, and especially when it is to their prejudice, lastly *Tenant* grant *Reint*, and after surrenders his estate, now between the parties, the Lease shall be extinct by the surrender, but to the *Grantee of the Reint* it shall be said to be in *Eff*, and if during his life, he in Remainder also grants a *Reint*, hee shall hold the Land subject to both the *Rents*, though that the grants be both to one self succession, so if he in Reversion grants his Reversion with warranty, and after the Tenant for life surrenders, and the Grantee be impleaded, he shall never vouch during the life of the Tenant for life, 5 H. 5. *Comments*. 24 *Ed.* 3. And here also is a custome which preserves the Copy-hold Estate in Remainder, and their particular Tenant cannot that prejudice, and for that also it shall not be turned into a right, as if a Copy-hold Estate be granted to one for life by one Copy, and after the Lord grants another Estate for life by another Copy to another, and then the first Copy-holder commits forfeiture, he which hath the second estate cannot take advantage of that, but the Lord shall hold it during the life of the first Tenant, for no act made by the particular Tenant shall prejudice him in Remainder, for otherwise many Inconveniencies would issue upon that, as by secret conveyances, or as if a grantee of a *Reint charge*, grant that to the Tenant of the Land for his life,



life, the Remainder over, the Remainder shall be good, notwithstanding that the particular Estate bee extinct and drowned, also he intended that the Copy-hold Estate is another thing, then the land it self, and for that the Fine shall not be a Barr, no more then in *Smith and Stapletons Case, Com.* Where a Fine levied of Land shall not be a Barr of Rent, inasmuch that it is another thing, so in this case he intended that the fine shall not be a Barr of the Copy-hold Estate, and concluded, &c. *Wynch* Justice was of opinion that the Fine shall not be a Barr to the Copy-hold Estate in Remainder, for the acceptance of the Bargaine and Sale doth not determine the first Copy-hold Estate for life, as to him in Remainder but only to the first Tenant and the Lord, and betwene those he agreed that the Copy-hold Estate is determined, as in *Haydens Case*, by acceptance of a Lease for years, and for that the Remainder shall not be turned to a Right, and by consequence shall not be barred, and for that he supposed that the reason that the Fine was a Barr in *Jessars Case* 3 *Cot* 123. b. was inasmuch that the Lessor entered, made a Feoffment and after levied a Fine, and it is there agreed that the Feoffment turns the Estate of the Lessee to a Right, and for that the Fine shall be a barr, and also there the Lessee was by limitation of time to have a beginning, but if a man makes a Lease for years to begin at a day to come, and before the beginning of that makes a Feoffment or is disseised, and Fine with proclamation is levied, yet he which hath future Interest shall not be barred, for this is not turned to a Right, and it was not the intent of the Statute of Fines to make a Barr of right, where there was no discontinuance or Estate at least turned to right, and this was the cause that at the Common Law, Fine with Non-challenge was no Barr, but where they make alteration of possession, and he cited *Palmerys case* to be adjudged, that a Fine of Land shall not be a barr for Rent, where the case was, Lessee for life, Remainder for life of Rent: The first Lessee for life of the Rent, purchaseth Land and levies Fine of that, and adjudged that this shall not binde them in Remainder of the Rent, no more, if he in remainder levy a fine that shall not prejudice the particular Tenant, and so he concluded in this case, that the Remainder shall not be barred and that the Plaintiff shall have Judgment. *Warburton* Justice accordingly, and he argued that the Statute of Fines contained two parts:

The first, to Barr those which have present right, and they ought to make their claim within five years after the Fine levied, or otherwise they shall be barred.

And the second those which have Right, title, or interest accrued, after the Fine levied, by reason of any matter which preceded the Fine, and in both cases the Estate which is barred ought to be

turned

turned into a right, or otherwise it shall not be barred, the which cannot be here, for the estate is given by the Custome, and it is to have his beginning after the Death of the first Tenant, and though that the first Tenant commit Forfeiture, yet he in remainder cannot enter, for his time is not yet come, as in 45 Ed. 3. is a collaterall Lease with warranty to the Tenant for life in possession, this shall not be a Barr, inasmuch that it is made to him which hath possession, so if a man make a Feoffment upon condition, and the Feoffee levy a Fine with proclamations and five yeares passe, and the condition is broken, the Feoffee may enter at any time, otherwise if the Fine had been levied after the condition broken, and so if the Lord be intitled to have *Cessavit*, and Fine is levied by the Tenant and five yeares passe, he shall be barred, and this was the cause of the Judgment in *Saffins* case, inasmuch as the Lessee had present interest to enter, and this was altered into a Right by the Feoffment, and then the Fine was a Barr, but here he in Remainder hath no right till after the Death of him which was the first Tenant, and then his right to the possession begins, and then if a Fine had been levied with proclamation this shall be a Barr, and so he concluded, that Judgment should be entered for the Plaintiff.

Coke.

Coke cheife Justice accordingly, and he agreed also that the sole question is, if by acceptance of a Bargaine and sale by the first Tenant for life, the Remainder be turned into a right, and he sayd, that right sometimes sleepeth, but it never dyes, but this shall be intended (the right of the Law) and not right of Land, for that may be barred by Writ of Right at the Common Law, and he intended that Copy-holdes are within the Statutes of Fines, be they Copyhold for life, yeares, in sayl, or in fee, for the third part of the Realme is in Copy-holdes, and two parts in Lease for yeares, and if chiefe shall not be within the Statute, then this doth not extend to three parts of the Realme, and it is agreed in *Hoydons* case 3 Coke 8. a. That when an act of Parliament doth not alter the Tenure, Service, Interest of Land, or other thing in prejudice of the Lord or of the custome of the Mannor, or in prejudice of the Tenant, there the generall words of such act of Parliament shall extend to Copy-holds, and also it is resolved to be within the Statute of 32 H. 8. Of Maintenance, and also it is within the expresse Letter of this, which contains the word Interest, and Copy-holder hath interest and so also of Tenant by Statute Merchant, then the question will be, if the acceptance of a Bargaine and sale turnes that to a right, and he intended that his Estate for life remaines, though that it is only passive in acceptance of Bargain and sale, and for that it shall not be prejudice more then if Tenant at will accepts a Bargaine and Sale, for his Estate at will, this notwithstanding remaines, but if Lessee for

for years or life, accepts a Fine upon conuſance of right, this is a forfeiture, inſomuch that it is a matter of record, and it ſhall be an eſtoppel to ſay that he did not take Fee by that, & doth not admit the Reverſion to be in another, alſo inſomuch that the Bargain and ſale was executed by the Statute for this cauſe it ſhall not be prejudice, as it was adjudged in the Lady *Greshams* caſe in the Exchequer, 28 *Eliz.* Where two ſeverall conveyances were made with power of Revocation upon tender of ten pound, and adjudged by act of Parliament that a revocation was good, and alſo that no liſenſe of alienation ſhall be made, inſomuch that it was by act of Parliament, which doth no wrong, and it is for the Treſpaſſe, for which the party ought to have liſenſe, and if it be not Treſpaſſe there need no liſenſe before hand nor pardon afterwards: So if a man makes a Leaſe for yeares, remainder for yeares, the firſt Leſſee accepts Bargaine and Sale, this ſhall not turn theſe in remainder to prejudice.

Revocation of  
uſes.

Thirdly it ſeemes to him alſo, that notwithstanding the acceptance of the Bargain and Sale, the firſt Copy-hold Eſtate for life remains in *Eſſe*, and is not determined. For this differs from an Eſtate of Land, for it ſhall not be ſubject to a Rent granted by the Lord: the firſt Eſtate remains, till all the remainders are determined, for the firſt tenant for life cannot ſurrender to the Lord, alſo it is cuſtomary eſtate, for by the Common Law this being granted to three ſucceſſively, this ſhall be determined and extinct for the third part, for they three take into poſſeſſion, and the word ſucceſſively, ſhall be taken as void, but here the Cuſtome appoints, that the remainder ſhall not have his beginning, till the death of the firſt Tenant, and that they ſhould take by ſucceſſion, and for that there is a difference between this cuſtomary Eſtate, and other Eſtates at the Common Law, and other ſurrenders, for if a Copy-holder ſurrender to the uſe of another for life, nothing paſſeth but for life only, the Lord hath not any remainder by this Surrender, and if this Tenant for life commits forfeiture, he in reverſion ſhall not take advantage of that, and if at the Common Law Tenant for life, remainder for life or in fee be, and the firſt Tenant for life makes a Feoffment, and after levies a Fine, and reſolved that he in reverſion ſhould not be bound till 5. yeares are incurred after the death of the 1. Tenant for life, for then his title of Entry firſt accrues in apparancy, and before that is in ſecrecy, of which he in remainder is not held to take notice, and ſo in this caſe he in remainder ſhall not be bound till five yeares are incurred after the death of the firſt Tenant, and the rather inſomuch as the firſt Eſtate remains, for that that the firſt Tenant was only paſſive and not active, and ſo he concluded that Judgement ſhall be given for the Plaintiff, inſomuch that the Fine was no Bar, and upon



upon this concordance of all the three Justices in opinion, no other Justices being present this *Term* Judgment was entered accordingly.

*Pasche 1612. 10. Jacobi, in the Common Bench.*

*Danyell Waters against the Deane and chapter of Norwich.*

**I**N covenant, The case was this in 37 *H. 8.* the then Deane and Chapter of *Norwich* made a Lease to one *Twiss* for fifty years, which ended 35 *Elix.* in time of *Ed. 6.* The then Dean and Chapter surrendered all their possessions to the King, which those newly endowed, and incorporated by the name of Deane and Chapter of the foundation of *Ed. 6.* and in the 8. *Elix. Salisbury* then Deane and the then Chapter made a Lease to *Thimblethorpe* for 99. years to begin after the said Lease for fifty years made to *Twiss*: And it doth not appeare by the pleading; that *Thimblethorpe* entered: But the succeeding Deane and Chapter in the 43. *Elix.* made another Lease to *Waters* the Plaintiff for three lives, rendering the ancient Rent quarterly, with warrant of Attorney to make livery, and it was not executed till after the end of three quarters of a year after the Sealing of it, and when the time of three rent daies were incurred: And in this Lease the Deane and Chapter covenanted with *Waters* to acquit and save harmlesse the Lessee and the premises during the *Term*, &c. By reason of any Lease made by them, or any of their Predecessors or by the Bishop: And then the Plaintiff in his Court, conveys the Lease made by *Thimblethorpe* to *Dodridge*, and that he entered and disturbed the Plaintiff, and so assigned breach of covenant, upon which this Action was founded, upon which the Defendants demurr in Law: And this was agreed by *Dodridge* the Kings Serjeant for the Defendants.

*Dodridge.*

First that the Lease made to *Waters* was void, and then the Covenants do not extend to charge the Defendants: And he supposed the Lease to be void, inasmuch that the Attorney did not make Livery, untill three Rent daies were incurred, and the Lease was made as well for the benefit of the Lessor, as for the Lessee, for if the Lessee is to have the profits and the Lessor is to have the Rent: And inasmuch that the Livery was not made before a Rent incurred, this tends to the prejudice of the Lessor, and for that the Authority is countermanded, and the Livery made after void, for when a man hath a Letter of Attorney to make Livery, he ought to make that in such manner, as the Feoffer himselfe would make it, and the Lessor cannot make that after a rent incurred, for then he should loose that Rent: Also Authority ought to be strictly pursued, as in 36. *H. 8. Dyer* 63. 24. Letter of Attorney was made to three joynly

joynly and severally to make Livery, and resolved that two cannot do it, see 11. *H. 4.* For it ought to be made joynly or severally, so here the Attorney ought to make the Livery as his Master will, and that ought to be made before any Rent incurred: And for this cause he intended the Lease to be void: And then as to a Collateral Covenant, which is in effect no other, but that the Plaintiff shall enjoy the Land during the Tearme, which is of an Estate which is nothing, for if the Lease be void, the Estate is nothing, and the Lessee hath not any Tearme or Estate in the Land: And he agreed that in the Record of *Chedingtons Case*, 1 *Coke* 153. *b.* And in the Commentaries, *Wrotleys Case* 198. And 2. *Eliz. Dyer* 178. There is a difference betweene *Terminum Annorum*, and the time or space of yeares, or the life of such a man, but there is not any difference between a Tearme and an Estate: Also he supposed that the words of the Covenant extend only to save the Plaintiff harmless of Leases made by these Defendants or any of their predecessors, and this Lease was made to *Traits* in time of *H. 8.* Which was before their Corporation, for they have been but named a Corporation in the time of *Edward 6.* and not before: And then a Lease made in the time of *H. 8.* is not made by them nor by their Predecessors, and so the Covenant doth not extend to that, as it appears by 8. *Ed. 4.* in case of prescription, if Corporation be changed in manner and forme, and the substance of their name remaine, yet they ought to make speciall prescription, then a *forfeiture* in this case, where the substance is changed; and so he concluded, and praied Judgement for the Defendants.

*Nicholls.*

*Nichols* Serjeant for the first argued, that the Livrey was well made, for these Defendants shall be intended Occupiers, and to have the profits of the Land till the Lessee entred or they waved the possession, and so no prejudice, and the Lessee shall not be charged with Rent till he enters, or the Lessor wave the possession, as it was resolved in *Bracebridges Case* Com. 423. *b.* and in the Deane and Chapter of *Canterburies Case* there cited: And for that the Livery shall be good, and the Lessor not prejudiced by the deferring of it, and then to the second, that is the Covenant, he agreed that if the Estate be created, and Covenant in Law annexed to it, if the Estate cease, the Covenant also shall cease: But if expresse Covenant be annexed, then the Covenantor ought to have regard to performe it, or otherwise an Action of Covenant lies against him, notwithstanding that the Estate be avoided: But here he intends it against him notwithstanding that the Estate be void: But here he intends the Estate continueth till *Thimblethorp* entred: But admitting that he had entred, yet the covenant shall bind the Covenantor, as in 12. *H. 4. 5. a.* Parson makes a Lease for yeares, and after is removed;

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an Action of covenant lies against him, and 47. *Ed.* 3. and 3. *Ed.* 3. If Tenant in tayl makes a Lease with expresse covenant and dies, and the Issue outs the Lessee, the Lessee shall have an Action of Covenant against the Executors of the Tenant in tayl, and 9. *Eliz.* *Dyer* 257. 13. Tenant for life, the Remainder over in Fee, by Indenture makes a Lease, without any expresse covenant and dies, Lessee cannot have an Action of covenant against his Executors, otherwise if there had been an expresse covenant: See the booke and many Authorities there cited to this purpose, and also he cited one *Rawlinsons Case* to be here adjudged, that if a man which hath nothing in land makes a Lease, and an expresse covenant for the injoying of that, if he which hath right enters, by which the covenant is broken, Action of covenant lies upon the expresse covenant: So that admitting that the Lease is void, yet the covenant is good and shall bind the successors; and so he concluded, and prayed Judgement for the Plaintiff, and this case was argued at another day by *Dodridge* the Kings Serjeant, by speciall appointment of the Judges, and now he supposed, that the Count contains that the same Dean & Chapter which made the lease to *Twaits* in 37 *H.* 8. also made the Lease to *Thimblethorp* in the 18 *El.* wch cannot be, insomuch that the corporation was changed in the time of *E.* 6. & for that cannot be the same Deane and Chapter, for if a Prior Covent be translated into a Dean and Chapter, and the Dean and Chapter will make prescription, they ought to make that in speciall manner, and not generally as Deane and Chapter, as it is resolved 39. *H.* 6. 14. 15. and in 7. *Ed.* 4. 32. In Trespasse against the Abbot of *Bermondssey*, it is agreed that the Prior was not Predecessor to the Abbot, as it appears by 10. and 11. *Eliz.* *Dyer* 280. 11, 12, 13. That the Deane and Chapter of *Norwich* made a surrender in the time of *Ed.* 6. and then newly incorporate: So that he which made to *Twaits* in the 37. *H.* 8. could not be Predecessor to the Deane and Chapter which made to *Thimblethorp* in 18. of *Eliz.* for he could not then be any Predecessor, and for that the Lease to *Thimblethorp* void, and then there is no Eviction, but wrong to the Plaintiff, for which he may have an Action of Trespasse, and then he cannot have an Action of covenant, as it appears by 22. *H.* 6. against the Lessor: But admitting that the Lease to *Thimblethorp* were good, then this hath his beginning in the 38. of *Eliz.* and makes the Lease for three lives to the Plaintiff void by the Statute of 13. *Eliz.* insomuch that the aforesaid Lease for yeares was then in beginning, and the Statute is expressly, that it shall be void, as the grant of next avoidance of a Church in the case of the Bishop of *Lichfeild* and *Coventry* against *Sale* cited in *Lincolne Colledge Case* 3. *Coke*, as if a Parson makes a Lease for yeares, and

*Dodridge.*



is Non-resident, the Lease is void by the *Statute* against the Parson himselfe, and then if the Estate be void, all covenants which depend upon that are also void: Also he supposed that there is not any good conveyance of the estate of *Thimblethorp* to *Doyley*, which is intended to be the disturber to make the *Covenant* to be broken; and then when *Doyley* entered without title, the *Covenant* cannot be broken, and so he concluded, and prayed Judgement for the Defendants.

*Nichols* Serjeant for the Plaintiff agreed, that if there be an alteration of Corporation, and title is to be made by prescription, it ought to be so specially shewed as it hath been said of the other part by *Dodridge*. But here it is not so, for the same *Dean* and *Chapter* which made the Lease to the Plaintiff, made the Lease to *Thimblethorp*, and this appears by the pleading; and the Lease made to *Twaits* is not mentioned, but only to shew the beginning of the Lease to *Thimblethorp*: And then the *Deane* and *Chapter* which made the Lease in 18 of *Eliz.* to *Thimblethorp*, were the same *Deane* and *Chapter* which made the Lease in 42. *Eliz.* to *Walters*. And hee supposed the *Covenant* being expressed, this remains; otherwise if it had been a *Covenant* created only by the Law, as it appears by the Books of 9. *Eliz.* *Dyer*, 257. 13. and 32 *H.* 6. 32. And also when a *Covenant* is created by Law, the *Covenantor* cannot have *Covenant*, if he be not outed by one which hath title, 26 *H.* 8. 36. otherwise of expresse *Covenant*, as it is agreed in the 12 *H.* 4. 5. So in 47. *Edw.* 3. *Covenant* lies against Executors: and 38 *Edw.* 3. *Covenant* lyes against Heir being made by Tenant in tayl, if the Lessee be outed after his death; and so hee concluded, and prayed Judgement for the Plaintiff.

*Wynch* Justice supposed that Judgement should be given for the Plaintiff, and that he had good cause of action; and he intended that the Livery and Seisin by the Attorney, after Rent incurred, was good. Secondly, That the *Covenant* shall extend to the Lease made to *Thimblethorp*; for it doth not appeare, but that it is the same *Deane* and *Chapter*, which was in time of *H.* 8. For it is not pleaded that it was founded by *Ed.* 6. but had his name by him. And also it is confessed by the Demurrer, that it is the same *Deane* and *Chapter*, but admitting that it is not, yet it may be answered, as it hath been by *Nichols* before, that is, that the *Deane* and *Chapter* which made the Lease in 8 of *Eliz.* to *Thimblethorp*, is the *Deane* and *Chapter* which made the Lease to the Plaintiff in the 42 of *Eliz.* are all one: and the Lease to *Twaits* is shewed only, to shew the beginning of the Lease made to *Thimblethorp*. Also he supposed the conveyance of *Thimblethorps* Estate to *Doyley* to be good; and it doth not appear but that the *Deane* and *Chapter* were in possession at the time of the making of the Lease

*Nichols.*

*Wynch.*

for 3 lives : So that this hath a good beginning, and continued till it was avoyded by the Entry of the succeeding *Dean*, for this remain good against the *Dean* that made it : But *Thimblethorpe* also may avoyd it during his Term, and now here is eviction by the Assignee of *Thimblethorpe*, before that the Lease be avoyded by the succeeding *Dean* and *Chapter*, where the *Dean* himselfe could not avoyd it, for he is the party which made it : Also here is expresse warranty against the Lease made to *Thimblethorpe*, and for that also action of *Covenant* lyes, otherwise if it had been only warranty in Law, as if Lessee for life had made a lease for years, and dyed : Upon the covenant in Law action doth not lye, for the Law doth not constrain to impossibilities, as in the 40. *Ed. 3.* *Covenant* that the wind shall not pierce nor break the Trees : and 2 *Ed. 4.* 22 *Ed. 4.* Action of *Covenant* lies upon expresse *Covenant*, though that a stranger enters without title, and he cyred one *Dormans* case to be adjudged, that where a man borrows money upon a usurious contract, and the Principall gives security to the Surety that was bound with him by collaterall Obligation : and the Surety being arrested, takes advantage of the Counterbond, notwithstanding that the principall Obligation was void by the *Statute* of Usury. So here, notwithstanding that the estate was void, and that is the principall : Yet the *Covenant* being expresse, and collaterall, shall bind the Lessor, and so he concluded that Judgment shall be given for the *Plaintiff*.

*Warburton.*

*Warburton* Justice to the contrary, and yet he agreed that the livery was good, notwithstanding that it was made by the Attorney, after three Rent dayes incurred, and he seemed that it might be made at any time during the term and the lives of the parties. And also he agreed that the Corporation shall be intended the same Corporation, and yet Corporation had no *Predecessor* nor *Successor* : but the *Statutes* say, *Predecessors*, *Antecessors*, and *Progenitors* of the King, as 39 *H. 6.* 7 *Ed. 4.* 2 *H. 6.* But he did not insist upon that, but agreed that : But the matter upon which he insisted, was, that the Lease to the *Plaintiff* was void against the succeeding *Dean* and *Chapter*, in so much that the lease to *Thimblethorpe* was in Effr at the time of the making of that, and this by the *Statute* of 13 *Eliz.* And it appears that the *Dean* which made the Lease to the *Plaintiff* is dead, for he is named in the Count, the late *Dean* : and then when the *Covenants* depend upon the estate, be they expresse, or in Law, these determin and end with the estate, as in *Lemons* case, 28 *H. 8.* *Dyer* 28. 189. resolved, that where the *Statute* of 21 *H. 8.* makes Leases being in the hands of Spirituall persons void, this avoys these *Covenants* also which depend upon the Lease. So if a Parson make a Lease and *Covenant* that he will not be non-resident, and binds himselfe for the performance of that, if the *Covenants* be released, the Obligation also is released.

released. So if the Lease be avoyded, the Covenants also are avoyded: And as an action of Covenant doth not lye for the not enjoying of Land after a surrender, so Covenant doth not lye after the estate is avoyded, see 4 H. 7. And to the case put by *Wynch* of counter-bond, where the Principall was void by the *Statute* of Usury: he said that there the Obligation was not void, but voidable by plea. But here it is, the estate is made void by the expresse words of the *Statute*: and he intended that this difference between expresse Covenant, and Covenant in Law, but that the one determines with the estate as well as the other, and yet he agreed that expresse Covenant shall extend to charge the *Covenantor* upon Entry by a stranger, which hath no title; but yet this doth not charge the *Lessor* after the estate determined, and so he concluded that Judgment ought to be given for the Plaintiff.

Coke chief Justice accorded with *Wynch* that Judgment shall be given for the Plaintiff: And he supposed that the livery was well executed by the *Attorney* after the 3 Rent dayes incurred: and yet he agreed that it had been a probable objection made against that: But he supposed that the *Lessor* was not prejudiced, insomuch that the Law intends that they had the possession and the profits of the Land till livery made, and the *Attorney* is only as a servant to the *Lessor*: And he said, that this is not like to *Cromwell* and *Andrews* Case, of grant of a Mannor upon Condition to re-grant Advowson or Rent, in which case the Advowson or Rent ought to be re-granted, before that the Church becometh void, or the Rent day be incurred, insomuch that they are followers of the thing granted, notwithstanding that the *Fofoer* hath time during his life to make the re-grant, if it be not hastned upon Request. 2. He supposed that the expresse Covenant shall bind the *Lessor*, though it be referred to the term; for term includes Estate and Interest, but this is when it is Term; but when it is no Estate, then it shall be intended during the continuance of the years, as it appears by the Rector of *Chedingtons* Case: and this he held clear, and so of promise also, as if a man makes a Lease for years, and before that the *Lessee* enters, makes a lease to another, and promises that the second *Lessee* shall enjoy during the term, if the first *Lessee* enter, the second *Lessee* may have an action upon the promise, and he said that it was adjudged in the *King's Bench*, Hill, 39 *Elix.* between *Foster* and *Wilson*, Plaintiffs, and *Mayer*, Defendant, where the case was, A man made a Lease of a Rectory for years, and covenanted with the *Lessee* to save him harmlesse against one *Blunt* Parson of *Dole*, which entered and outed the *Lessee*, which brought Covenant against the *Lessor*, and resolved that it lyes notwithstanding that it doth not appear whether he had Interest or no: So that be the Lease good or void: yet when there is an Eviction, Co-

Coke:



venant lyes, though the Lease be originally void, yet till it be avoided, it shall be intended a good Lease: And if a *Covenant* of *Dean* and *Chapter* doe not bind them, none will take Lease of them, so they shall be compellable to plow the Land themselves, and also he supposed that the Lease was good against the succeeding *Dean* and *Chapter*, till it be avoyded by Entry, as it was adjudged, *Trin. 30. Eliz.* between *Elmer* and *Page*, where a Bishop made a Lease for years, and dyes, the *Successor* makes a Lease for 3 lives, the Lease for years not determined: And it was resolved that the Lease for 3 lives was void, notwithstanding that the Bishop might make a concurrent Lease for years, which is not made void by the *Statute* of 1 *Eliz.* inso-much that the *Statute* is in the definitive, that is, *Leases* for 3 lives, or 21 years, and so they cannot make both, for then the *Lessee* for life should have the Rent reserved upon the Lease for years, which is serled in the *Lessee* for 3 lives, by the regreis of the *Lessee* for years: and so he said also, notwithstanding that the *statute* of 18 *Eliz.* made void all Leases made by *Deane* and *Chapters*, where there are more then 3 years in being; he agreed that a Lease for years, where there are so many years in being is good: but if there be but two years in being, that makes the Lease for life void. And he agreed that notwithstanding the *statute*, yet any Lease shall be good against the *Deane* himselfe, inso-much that he is party to that, and hath a negative voyce in the making of that: And he seemed that the Proviso in the *statute* of 18 *Eliz.* did not extend to Leases in possession, but to Leases in reversion, which are dormant, of which a stranger cannot take notice, inso-much that they are invisible; and for that, if a *Dean* and *Chapter* procure surrenders of them, and within 3 years, that shall make another Lease good, and so they shall save their *Covenant*, and for that the Lease here made to the *Plaintiff* had been good, if the *Defendants* had procured the Lease made to *Thimblethorp* to be surrendred within 3 years after the taking of that. Also he cyted the Case betwixt the Bishop of *Lychfeld* and *Coventry*, and *Sale* to be adjudged, *Michaelmas* 32. and 33. *Eliz.* That a grant of the next avoydance is good against a Bishop himself that granted it, and not made void by the *Statute* of 1 *Eliz.* as to him, but to all *Successors* only. And so in this case he said, they all agreed that the Lease was not void which is made to *Waters* against the *Deane* himself which made it, but only against the *Successor*. And he said also, *Covenant* in Law extends to lawfull *Evictions*, and to *estates* in being, and not where an estate is determined, as if *Lessee* for life makes a Lease for years, and dyes; the *Lessee* shall not have an action of *Covenant* upon *Covenant* in Law, as it is agreed in 9 *Eliz. Dyer*, and 38 *H. 6.* before cyted. So also he supposed to expresse reall *Covenants* which extends to *Free-hold*, or *Inheritance*, as *Warrant* and *Defend*, upon which

which a man cannot have an action, if he be not outed by one which hath title; and as in 3 *Edw. 3.* 7 and 21. A man makes a *Feoffment* with warranty, *non feoffavit*, is a good Plea; for if the *Feoffment* be avoided, the *Warranty* also is avoided, for that depends upon the *Feoffment*. But if a man makes a *Lease* for years, and covenants that he will warrant and defend the Land to the *Lessee*, if the *Lessee* be outed by one which hath title, or without title, he may have an action of *Covenant*, for the *Lessor* hath the Evidences, and ought to defend the possession of his *Lessee*, and the right also, and damages are only to be recovered; and so is the difference between a *Lease* and *Inheritance*, though that the words of the *Covenant* are all one. And also he said that it may be objected, that the Incorporation (was not well pleaded) by *Edw. 6.* Inasmuch that he doth not say after the Conquest, for *Ed. 3.* was *Ed. 6.* in truth, for there were 3 *Edwards* before the Conquest, and he was the third after: And he saith that he hath known many exceptions to be taken to that, but hath not known any of them to be allowed, and for that he will not insist upon it. But the principal matter upon which he insists, was, that it doth not appear by the pleading, that the *Deane* which made the *Lease* was dead: and it appears by the pleading, that he entered in 4 *Jacobi* and was seised, and then of necessity ought to be living; and such averment of his life is sufficient, as it is agreed in the 13 *Eliz. Dyer*, where a Parson made a *Lease* for years, and the *Lessee* brought an *Ejectione firme*, and in pleading it was said, that the Parson is seised of the reversion, and this was allowed to be good without other averment of his life, for he cannot be seised if he be not living: and then if the *Deane* shall be intended to be living, then they all agreed that the *Lease* shall be good against him; for it was adjudged in this Court between *Blacksteech* and *Smal*, that if a Bishop makes a *Lease* for years, and after makes a *Lease* for life, the *Lease* for years being in *Esse*, and dyes, and the Successor accepts Rent, this shall bind him: and by this it appears that the *Lease* was good against the *Dean* himself which made it, and also against the Successor, till he enter and avoid it, and then by consequence the action of *Covenant* shall be very well maintainable, and so he concluded also that Judgment should be given for the *Plaintiff*, which was done accordingly.

*Pasche, 16. 12. 10. Jacobi, in the Common Bench.*

*Browning against Strelley.*

**M**ichael. 2 *Jac. Ret.* 531. In debt, the Margent of the Count contains *Nottingham*, and the Count it self contains that the Obligation

gation was made at the Town of *Nottingham*, which is a County of itself, and the *Defendant* pleads *non est factum*, and the view was of the Town of *Nottingham*, and it was tried by the Jury of the County of *Nottingham*, and this was moved in arrest of Judgment after verdict for the *Plaintiff*, by *Nichols* Serjeant. And it was agreed by all the Justices, that Judgment shall be given accordingly to the verdict, inasmuch that notwithstanding that the Town of *Nottingham* is a County of itself, yet it may be that some part of the Town may be within the County, and for that possibility they would not arrest the Judgment.

## Ireland against Smith.

IN action upon the Case for these words, the *Plaintiff* counts that he was, and is Proctor in the *Arches*: and in communication between one *Morgan* and the *Defendant* of him, the *Defendant* said to the said *Morgan*, You take part with *Ireland* against me, who is an arrant *Papist*, and hath a Pardon from the *Pope*, and can help you to such an one if you will: And after verdict it was moved by *Hutton* Serjeant in arrest of Judgment, that the action doth not lye; and he saith, that it hath been adjudged in this Court, 3 *Jacobi*, Rot. 7031. between *Kingsme* and *Hall*, that an action doth not lye for like words, he is an arrant *Papist*: And it were good that he and all such as he is were hanged, for he and all such as he is would have the Crown from the Kings head if they durst: And it was adjudged, that an action doth not lye for these words, which are more strong then the words in this action: but of the other part it was said by *Haughton* Serjeant that he did not insist upon these words, that he is a *Papist*, but that he had obtained a Pardon from the *Pope*, the which by the *Statute* of 13 *Eliz.* is made High Treason, and then notwithstanding that no time was limited when the Pardon should be procured, that is before the *Statute* or after, yet it shall be intended such a Pardon which is against the *Statute*; for the presumption of the Law shall be taken in the worst sense, and not like to the Case, where a man saith to another that he hath the *Pox*: And also it is alledged by the Court, that the *Plaintiff* is not above the age of 40. years, so that he cannot obtain a Pardon before the *Statute* of 13 *Eliz.* And for that he supposed that the action is very well maintainable. *Coke* cheif Justice said, that it was adjudged in the *Kings Bench* in the time of *Catlyn* cheife Justice there; that an action upon the Case doth not lye for calling a man *Papist*. And *Winch* Justice said, that if a man call a *Bishop* or another man which is trusted with government of the Church, and Ecclesiasticall causes, that he thought the action lyeth, otherwise not. Also he supposed that the Pardon might be for *Purgatory*, or other matters which are not within the *Statute* of 13 *Eliz.* And also the Pardon



Pardon may be procured by another, and come to his hands by delivery over afterwards that it had passed two or three, and the averment is not sufficient, for it is onely Implication and Inference, *Coke and Warberton* Justice sayd, that a Papist is one that errs in his opinion, and though that the Papists are Authors of many Treasons, yet the Law doth not intend so, and so of Heretick, which is alwaies in a fundamentall point of Religion, and yet an action doth not ly for calling a man Heretick, also the Pope is a temporall Prince in Italy, and for this cause also may pardon, and this is out of the Statute of 13 *Elic.* and so they all agreed that the Action doth not ly for these words.

Pasche 1612. 10 Jacobi, In the Common Bench.

### Marstones Case.

IN a common Recovery the Tenant appears by Attorney, and vouches one which is present in Court, which appears, and vouches the common Vouchee, and the Attorney hath a Warrant of the party acknowledged before a Judge, but this was not entred of record, and this was in *Hilary* tearme 16 *Elic.* And it was moved by *Dodridge* the Kings Serjeant, that the Warrant of Attorney might be now amended and entred upon the record, and *Coke* supposed cleerly that it shall not be entred, inasmuch that it is a want of a Warrant of Attorney, but if there had been a mis-construing of the Warrant of Attorney, otherwise it is, for this seems to be within the Statute of 27 *Elic.* Chapter 5. Concerning amendments.

Common Recovery.

In Debt upon an obligation with condition to perform Covenants in an Indenture of Lease the Defendant pleads, that after and before the originall purchased, the Indenture was by the assent of the Plaintiff, and the Defendant cancelled and avoyded, and so demands Judgment if action, and it seemes by *Coke* cleerly, that the Plea is not good without averment that no Covenant was broken before the cancelling of the Indenture.

Obligation to performe Covenants.

Pasch. 12. Jacobi, 1612. In the Common Bench.

### Barde against Scrubbing.

IT was moved in arrest of Judgment, that the *Venire facias* wants these words, *Et habeat ibidem neminem paratorem*, but the words, *Venire facias dandam*, &c. were inserted, and it seems by all the Justices that it was good, and that the first words,

Arrest of Judgment.

words, and supplied in the last, and they aided by the *fruits* of *possession*, after verdict, and so it was adjourned.

*Audita querela.*

In *Audita querela* sued by the Sureties upon an escape made by the principall, they being in execution offered to bring the Money into the Court, or to put in sufficient Sureties to the Court, and so prayed that they might be bayled, and it was agreed, that if *Audita querela* be grounded by specialty or other matter in writing, or upon matter of Record, *Superfedeas* shall be granted before that the party be in Execution, and if he be in execution he shall be bayled, but if it be founded upon a matter in Deed, which is only surmise, he shall not have *Superfedeas* in one case, nor shall be bayled in the other case, and so was the Opinion of all the Justices.

*Wast.*

*Estrepement  
awarded.*

In an Action of Waste for digging of earth to make Brick, Estreperment was awarded, and upon *Affidavit*; that the Writ of Estreperment was delivered to the Sheriff, and that he gave notice of that to the party, and he notwithstanding that continues to make waste, attachment was awarded.

Pasch. 12 Iacobi, 1612. In the Common Bench.

Fetherstones Case, Trinity 1612.

*Ejectione firme.  
Refusal.*

In *Ejectione firme*, The Plaintiff had Judgment, and an *Habere facias possessionem* to the Sheriff of Coventry, which returns that he had offered possession to the Plaintiff, and he refused to accept it, and it seems that the Plaintiff cannot have *Habere facias possessionem*, inasmuch that it appears by the Record, that he hath refused to have the possession.

*Lord of a  
Mannor inclose  
the Demesnes  
adjoyning to the  
Common.*

The case was, A Dean and Chapter being Lord of a Mannor, parcell of the Demesnes of the Mannor being severall, adjoynd to the Common, which was parcell of the waste of the Mannor, and one Copy-holder which had Common in the sayd Waste, puts his Beasts into the sayd waste to take his Common, and they for default of inclosure escape into the sayd Demesnes, by which the Lord brings his action of Trespass, and upon this the Defendant pleads the speciall matter, and that the Lord, and all those whose Estate he had, in the said place where the trespass is supposed to be made, have used to fence the said place which is parcell of the Demesnes of the sayd Mannor, against the Commoners which have Common in the sayd Common, being parcell of the waste, and also of the demesnes of the sayd Mannor, and that the Beasts of the sayd Defendant, escaped into the sayd place in which, &c for default of inclosure, and so demands Judgment, upon which the Plaintiff demurs in Law: In the agreement of which, it was agreed by Hutton and Houghton

*Haughton* the Serjeants which argued it, whether a man by prescription, is bound to make fence against Commoners, as it is agreed in the 20 H. 6. 7. 8. 21 H. 6. 33. But the doubt which was made in this case by *Haughton* which demurred was, for that that the Lord which by the prescription ought to inclose is owner of the soyle also, against which he ought to inclose, and so he ought to inclose against himself, and for that he supposed that the pleading should have been, that there is such a custome there, and of time out of minde that the Lord shall inclose against the Common, insomuch that by that the Copy-holder would bind the Lord, and upon that it was adjourned, &c.

Pasch. 12 Jacobi, 1612. In the Common Bench.

Sir Henry Rowles against Sir Robert Osborne and  
Margeret his Wife.

**I**N *Warrantia Charte*, the case was, Sir Robert Osborne and his Wife levied a Fine of the Mannor of *Kelmersb*, with other Lands in *Kelmersb*, to Sir Henry Rowles, against all persons, and this is declared for the Lands in *Kelmersb* to be to the use of Sir Henry Rowles for life, with diverse Remainders over, and for the Mannor no use was pleaded to be declared at all, and then a Writ of Entry in the *Poss* was sued against the sayd Sir Henry Rowles which vouched Sir Robert Osborne, and his sayd wife, and this was declared for the sayd Lands to be to the use of the sayd Sir Henry Rowles for his life with other Remainders over, which were declared upon the Fine of the Lands in *Kelmersb* only, and of the Mannor of *Kelmersb* no uses were declared, upon the Recovery also, and upon this Recovery pleaded in barr the Plaintiffe demurred, and it was argued by *Dodridge* Serjeant of the King for the Plaintiffe, that the Plea in Barr was not good, insomuch that it doth not appeare that the warranty which was executed by the Recovery was the same warranty which was created by the Fine, and also the Fine was taken for assurance against the Issue in tayle, and the Recovery to Barr the remainders, and so one shall not destroy the other, and for the first he sayd, that a man may have of another severall warranties, and severall causes of Voucher and all shall be together, for warranty is but Covenant reall, and as well as a man may have severall Covenants for personall things, as well he may have severall reall Covenants for one self same Land, as if the Father infeoff one with warranty, and the Sonn also releases to the same Feoffee with warranty, or if the Father infeoff one with warranty against him and his Heires and the Sonn release with warranty against all men, the Feoffee may

*Warrantia  
Charte.*

*Dodridge.*



words, are supplied in the last, and they are aided by the *statute of*  
*Jeofailor*; after verdict, and so it was adjourned.

*Audita querela.*

In *Audita querela* sued by the sureties upon an escape made by the principall, they being in execution offered to bring the Money into the Court, or to put in sufficient Sureties to the Court, and so prayed that they might be bayled, and it was agreed, that if *Audita querela* be grounded by specialty or other matter in writing, or upon matter of Record, *Superfedeas* shall be granted before that the party be in Execution, and if he be in execution he shall be bayled, but if it be founded upon a matter in Deed, which is only surmise, he shall not have *Superfedeas* in one case, nor shall be bayled in the other case, and so was the Opinion of all the Justices.

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In an Action of Waste, for digging of earth to make Brick, Estrepe-ment was awarded, and upon *Affidavit*; that the Writ of Estrepe-ment was delivered to the Sheriff, and that he gave notice of that to the party, and he notwithstanding that continues to make waste, attachment was awarded.

Palch. 12 Iacobi, 1612. In the Common Bench.

Fetherstones Case, Trinity 1612.

*Ejectione firme.  
Refusall.*

In *Ejectione firme*, The Plaintiff had Judgment, and an *Habere facias possessionem* to the Sheriff of *Coventry*, which returns that he had offered possession to the Plaintiff, and he refused to accept it, and it seems that the Plaintiff cannot have *Habere facias possessionem*, inasmuch that it appears by the Record, that he hath refused to have the possession.

*Lord of a  
Mannor inclose  
the Demesnes  
adjoyning to the  
Common.*

The case was, A Dean and Chapter being Lord of a Mannor, parcell of the Demesnes of the Mannor being severall, adjoynt to the Common, which was parcell of the waste of the Mannor, and one Copy-holder which had Common in the sayd Waste, puts his Beasts into the sayd waste to take his Common, and they for default of inclosure escape into the sayd Demesnes, by which the Lord brings his action of Trespass, and upon this the Defendant pleads the special matter, and that the Lord, and all those whose Estate he had, in the said place where the trespass is supposed to be made, have used to fence the said place which is parcell of the Demesnes of the sayd Mannor, against the Commoners which have Common in the sayd Common, being parcell of the waste, and also of the demesnes of the sayd Mannor, and that the Beasts of the sayd Defendant, escaped into the sayd place in which, &c. for default of inclosure, and so demands Judgment, upon which the Plaintiff demurs in Law: In the agreement of which, it was agreed by *Hutton and Haughton*

*Haughton* the Serjeants which argued it, whether a man by prescription, is bound to make fence against Commoners, as it is agreed in the 23 H. 6. 7. & 21 H. 6. 33. But the doubt which was made in this case by *Haughton* which demurred was, for that that the Lord which by the prescription ought to inclose is owner of the soyle also, against which he ought to inclose, and so he ought to inclose against himself, and for that he supposed that the pleading should have been, that there is such a custome there, and of time out of minde that the Lord shall inclose against the Common, inso much that by that the Copy-holder would bind the Lord, and upon that it was adjourned, &c.

Pasch. 14 Jacobi, 1612. In the Common Bench.

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*Dodrige.*

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*Waste.*

*Essement awarded.*

In an Action of Waste for digging of earth to make Brick, Estrepe-ment was awarded, and upon *Affidavit*; that the Writ of Estrepe-ment was delivered to the Sheriff, and that he gave notice of that to the party, and he notwithstanding that continues to make waste, attachment was awarded.

Pasch. 12 Iacobi, 1612. In the Common Bench.

Fetherstones Case, Trinity 1612.

*Ejectione firme.*  
*Refusal.*

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Pasch 12 Jacobi, 1612. In the Common Bench.

Sir Henry Rowles against Sir Robert Osborne and  
Margeret his Wife.

**I**N *Warrantia Charte*, the case was, Sir Robert Osborne and his Wife levied a Fine of the Mannor of *Kelmersh*, with other Lands in *Kelmersh*, to Sir Henry Rowles, against all persons, and this is declared for the Lands in *Kelmersh* to be to the use of Sir Henry Rowles for life, with diverse Remainders over, and for the Mannor no use was pleaded to be declared at all, and then a Writ of Entry in the *Post* was sued against the sayd Sir Henry Rowles which vouched Sir Robert Osborne, and his sayd wife, and this was declared for the sayd Lands to be to the use of the sayd Sir Henry Rowles for his life with other Remainders over, which were declared upon the Fine of the Lands in *Kelmersh* only, and of the Mannor of *Kelmersh* no uses were declared, upon the Recovery also, and upon this Recovery pleaded in barr the Plaintiffe demurred, and it was argued by *Dodridge* Serjeant of the King for the Plaintiffe, that the Plea in Barr was not good, inso much that it doth not appeare that the warranty which was executed by the Recovery was the same warranty which was created by the Fine, and also the Fine was taken for assurance against the Issue in tayle, and the Recovery to Barr the remainders, and so one shall not destroy the other, and for the first he sayd, that a man may have of another severall warranties, and severall causes of Voucher and all shall be together, for warranty is but Covenant reall, and as well as a man may have severall Covenants for personall things, as well he may have severall reall Covenants for one self same Land, as if the Father infeoff one with warranty, and the Sonn also releases to the same Feoffee with warranty, or if the Father infeoff one with warranty against him and his Heires and the Sonn release with warranty against all men, the Feoffee may

*Warrantia  
Charte.*

*Dodridge.*

vouch one, and *Rebut* against the other, so of Warranty of Tenant in taylor and release of an Ancestor collateral with warranty in Law, and expresse warranty, as it is agreed in 31 *Ed. 1. Finch Voucher* 289. And upon that he concluded that a man may have severall warranties of one selfe same man, and the one may be executed and the other remaine, notwithstanding that it be for one selfe same Land, and he supposed the effect of these warranties are as they are used, for if that may vouch generally, and bind himselfe upon the Fine or upon his owne warranty, or upon the warranty of his Ancestor, notwithstanding that the voucher be generally, as it is 31. *Ed. 3. Warranty of Charters* 22. So if he be vouched as Heire, though that it were speciall, but if he be Heire within age otherwise it is, for that is a good Counter Plea that he was within age, and so praied (that the word might demur) during his nonage, 17. *Ed. 2. Counter Plea of voucher* 111. 21. *Ed. 4. 71.* Then he supposed here was generall warranty which is executed, and also another warranty which remaines, notwithstanding any thing which appears to the Court for he hath not demanded any binding, 10. *Ed. 3. 15. 4. 6.* Also the warranty in the Fine is the warranty of all the Conusees, and the warranty upon which the voucher is, is only the warranty of Sir Robert Osborne, which cannot be intended the same warranty which is contained in the Fine which is by two, as it is resolved in 10. *Ed. 3. 52.* But admitting that it agrees in all, that is the voucher and the warranty in the Fine, that is, in number of persons and quantity of land and all other circumstances, yet it shall be no Barr, for the Common Recovery is only as further assurance, for it is for forfeiture if it be suffered by Tenant for life, as it is resolved in *Polham's Case* 1. *Coke*: Also he supposed that notwithstanding that the Fine was levied hanging the Writ of entry, and to Sir Henry Rowles made Tenant, yet this is good being by purchase, but not if it be by discent or by recovery upon elder Title: And he supposed that if the recovery and the warranty might be together by any possible meanes, they shall not be destroyed, inasmuch that this is the common case of assurance, and for that shall be taken, as in *Parrish's Case* 4. and 5. *Phil and Mary Dyer* 157. and 1. *Coke. Cromwell's Case* 57. 6. where a man makes a Feoffment upon condition rendering Rent, and after suffers common recovery, and yet this notwithstanding the condition and Rent remaines: And so it seemes that in this case the warranty remaines notwithstanding the Recovery, and so he concluded, and praied Judgement for the Plaintiff.

*Nicholls.*

*Nicholls* Serjeant for the Defendant, and he saied that the warranty is destroyed, first inasmuch that the Recovery was to other uses, and the Tenant when proved that there was no further

ther assurance, also he supposed, that inſomuch that it doth not appeare to what uſe the Recovery was for the Mannor of *Kelmerſe*, that for that it ſhall be intended to the uſe of Sir *Robert Osborne* himſelfe, and then for that alſo the warranty is diſtroied, inſomuch that part of the Land is re-aſſured to Sir *Robert Osborne*, as in 40. *Ed. 3. 13.* The Father enſeoffes the Son with warranty, which re-enſeoffes the Father, this deſtroies the warranty: So if they make partition by their owne Act, as it is agreed in the 34. *Ed. 3.* Alſo he ſuppoſed that the Tenancy in Sir *Henry Rowles* is diſtroied before that the Fine was Levied, inſomuch that this was Executed by voucher, and ſo he did not purchaſe hanging the Writ, for this is alſo conveyed from him by the Recovery in the value before that the Fine is levied, and it is all one with the caſe, where a man recovers upon good Title hanging a Writ, and he agreed, that the recovery had been for further aſſurance, that then it ſhall be as it hath been objected by the other party, and the warranty had remained, but this he ſuppoſeth, it was not, inſomuch it was to other uſes then the Fine was, and he intended that if the Eſtate to which the warranty is annexed be diſtroied, the warranty alſo ſhall be diſtroied, 19. *H. 6. 59. 21. H. 6. 45. 22. H. 6. 22. and 27.* So if the Eſtate be avoided the warranty is diſtroied, if it be by the Act of the parties named, alſo he ſuppoſed that the warranty is executed, and that it ſhall be intended the ſame tye upon which the warranty is created as it is 10. *Ed. 3. 51. Mauxells caſe Com:* if he demand no tye but enter generally into the warranty, there ſhall be execution of all warranties and ſhall bind all his rights, for otherwiſe all the Eſtates tayl cannot be bound by that: But where the (*Lien*) is demanded as where there are three ſeverall Eſtates tayl limited to one man, and upon voucher he enters generally into the warranty, all the tayles ſhall be bound, but if he demand the *Lien's* which he hath to bind him to warranty, there ſhall be a Barr of that only, upon which the voucher is, and the remedy is, that if he be impleaded by the party, that hath made the warranty, he ſhall be rebutted by his owne warranty: But if he be Impleaded by a ſtranger he ſhall vouch him that warranted that, and if warranty be once executed by voucher and Recovery in value, though that the Land recoverd in value be a defeaſable Title, yet the party ſhall not vouch at another time by the ſame warranty, as it is 5. *Ed. 3. Fitz. voucher 249. and 4. Ed. 3. 36.* And for that in this caſe, inſomuch that the warranty was once executed, he ſhall not vouch againe upon the ſame warranty: Alſo it is not alledged in the Count that the Plaintiff was Impleaded by Writ of Entry in the Poſt, but in the Per, in which he might have vouched, and ſo ſhall not have this Action, where he might have vouched: And alſo he



supposed that Sir Henry Rowles shall not have benefite by this warranty without praying aid of those in remainder, insomuch that he is but Tenant for life, but he supposed that it was no Remainder but reversion, for otherwise they are but as an Estate, and he may have advantage of the warranty, as it seemes without aid praying: But not where there is Tenant for life with the reversion expectant; And so he concluded, and praied Judgement for the Defendant. And he cited one *Barons Case*, where Tenant in tayl levies a Fine with warranty, and after suffers Recovery: And it was agreed by all the Justices, that yet the Recovery shall be a Barr to the Remainder, notwithstanding that the Estate tayl be altogether barred and extinct by the Fine, but *Coke* cheife Justice said; that *Wraye* cheife Justice would not suffer that to be argued, insomuch that it was of so great consequence being the common course of assurances: But it seemes that the Recovery shall not be a Barr for the Remainders for the causes aforesaid, and he said that he was of counsell in *Barons Case*, and thought this Objection to be unanswerable, and of this opinion continued.

*Pasche 1612: 10. Jacobi, in the Common Bench.*

Richard Lampitt against Margeret Starkey.

*Devise of a  
Lease.*

*Dodridge.*

**E** *SECTION E* Firme upon speciall verdict, the case was this, Lessee for five hundred yeares, devised that to his Father for life, the remainder and residue of that after the death of his father to his Sister, the Devisor dies, the Sister which hath a remainder takes a Husband, the Husband at the request of the Father grants release, and surrenders all his Right, Terme, and Intrest, to the Father which had the Possession: And the question was; if by that the remainder of the Terme should be extinct or not: And it was argued by *Dodridge* for the Plaintiff, that the remainder remains that notwithstanding, insomuch that this is a possibility only, which cannot be granted surrendered or released, and yet he agreed, that if Lessee for life grant or demise the land, all his Estate passeth without making of any particuler mention of it, as it is agreed in 10. *Eliz. Dyer*. And for that when the Lessee hath devised the Lands to his Father for his life, that which remains is only a possibility, for it doth not appeare for what yeares the Sister shall have it, and for that meerely uncertaine, 7. *Eliz. Dyer* 244. The King *Ed. 6.* appropriated a Church to the Bishop to take effect after the death of the present Incumbent, the Bishop after that makes a Lease for yeares to begin after the death of the Incumbent, and void for the uncertainty, for the Bishop hath no perfite Estate, but

but future Interest, which is meerely impossibility, and with that agreed *Locrofts Case*, in the Rector of *Cheddingtons Case*, 1. *Coke* where Lessee for yeares makes assignement of so many of the yeares as shall be to come at the time of his death, and void for the uncertainty, insomuch that it is meerely possibility, for that which may be granted or surrendered, ought to be *Interesse Termini* at least: And he supposed it could not be released, insomuch that he to whom the release is made, hath all the Tearme if he lived so long; and so he concluded, and prayed Judgement for the Plaintiff.

*Harris* Serjeant for the Defendant; argued that the first devisee had two Titles, one as Executor and another as a Legatee, and before entry, and after that he had entred also the Law doth adjudge him in as a Legatee, and before that he enter he may that grant over, notwithstanding that he hath not determined his Election, for the Law vests the property and possession of that in him, before any entry, but to make an election there ought to be some open Act done, as it is agreed in *Welden & Eltingtons Case*, where that the first devisee which was Executor, also made expresse claime to have the Tearme as Legatee and not as Executor, and so vested the remainder also, see *Com. 519. b.* And so in *Paramore and Tardlies Case*, Lessee for years devises his Tearme to his Executor during his life to educate his Issues, the which the Executor doth accordingly, and this open act was resolved to be a good election, and in *Mannings case*, 8 *Coke* 94. *b.* The Executor which hath the 1. Estate devised to him, saith, that he to whom the Remainder was limited shall have it after his Death, and this resolved to be a good Execution and election, and it is there resolved, that such Election made by the particular Devisee is a good Execution for him in remainder, but here is not this Election to have this as Legatee nor Executor, for there is not any overt Act made by which this may be done.

Secondly he conceived that this is no remainder, but Executory devise, as it is agreed in *Mannings Case*, and that this may be done by Devise which cannot be done by the party by act Executed, and for that he conceived that there is no possibility, but an Estate Executed and vested in him which is Executor, though there be no election made nor Execution of the Legacy, and admitting that it is but a possibility, yet he conceived that it is *Propinqua possibilitas*, insomuch that the Tearme is longer, then it may be intended, that any man might live, insomuch that *Adam* lived but 950. yeares, and this is five thousand yeares, which is longer then any man in the world ever lived, and he said that it is agreed in *Fullwoods Case*, that possibility may be released to a possession, and with this agreed the opinion of *Strange*, in the 9 *H. 6.* 64. And so warranty may be released

*Harris.*

*Assent to a Legatee.*

*Remainder of a Chattell.*

*sed*

sed which is *meerly* in contingency, as it is agreed in *Littleton*, and power of revocation may be extinct by release of him that hath the possession of the Land, and so he concluded and prayed Judgment for the Defendant.

*Nicholls* Serjeant for the Plaintiff, conceived that the Remainder is in *Effe*, and not determined by the Release.

And first he conceived that the Remainder was executed, inso-much that the Release was made at the Request of the Father, which was the first *Devisee*, for this shewes his assent, and implies that he took notice of his Remainder, and assented to it, and he sayd, it was adjudged in *Doctor Lawrences Case*, that the speaking of these words by the Executors, that is (that they were glad of the *Devise*) was a good Execution and assent of the Legacy.

Secondly, He conceived that it is only possibility, and for that cannot be released or granted, and he saith that the Law hath great respect of possibilities that Estates may revert, and for that it is adjudged in the 13 of *Richard 2. Dower 55*.

If Tenant for life grants his Estate to him in remainder in tayl for his owne life, the Tenant enters, takes a Wife and dies, she shall not be Indowed, but the Tenant for life shall have it againe, and it shall be as it had been let to a stranger, and to this purpose also he cited, 18. Ed. 3. 8. Counter-Plea of voucher 8. And it was adjudged in *Middletons Case 5, Coke 28. a.* that an Executor before probate of the Will may release a Debt, but not an Administrator before Administration granted, see *Com. 277, 278. Fox and Greifbrookes Case*, and in 6. Ed. 3. Lessee for anothers life, rendring Rent, the Rent was behind and the Lessor releases to the Lessee all Debts, he for whose life dies, and there the Release determines and discharges the *arrerages*, for it is a duty, and *Debitum* is Latine as well for Debt as for duty, also release bars the Lord and Writ of deceit for reverser of a Fine levied of land in ancient *Demesne*, as it is 7. H. 4, and yet *Littleton* saith, that release of a future thing shall not be a barr, and for that if *Consees of Statute Merchant*, release all his Right in the land yet he may extend the Statute 15. *assise*. And so if a mad man release, and after come to his wits and dies, *Quere* if the Heire may have a Writ of *non compos mentis*: And he said that it was adjudged in the 25. of *Eliz.* If an Infant levies a Fine, and after he levies another Fine, this shall be a Barr in a Writ of error for the reversing of the first, otherwise of a release: And here to the principall case to a release made by the Son in the life time of his Father without warranty: And so upon all these cases he concluded, and prayed Judgment for the Plaintiff.

*Sherley.*

*Shirley* Serjeant for the Defendant argued, that the acceptance of Release by the first *Devisee*, shall not be execution of the *Devise*,



as it was adjudged in *Barramotes* and *Tardleys* case by the Education of the Issue, or a *Devise* upon condition to pay money, and the *Executor* pays it, this is a good execution: But here the thing which makes the execution is only release, which enures as Release. And for that the accepting of the release, it cannot be execution of a Legacy. But if the *Executor*, to whom the first *Devise* was made, had had any *Co-executor*, and he would not have suffered him to joyn in occupation with him, that had been full Declaration of his intent, that he took it as a *Devise*, and not as an *Executor*, as it is agreed in the 10 *El.* 277. *Dyer* 50. And he said also, that it hath been agreed to him, that it is such a possibility that cannot be granted, as it is agreed in *Fulwoods* case, 4 *Coke*, 66. b. And he said it is not like to *Harveys* & *Bartons* case, where two Joynt-tenants for life were, and one made a Lease for years to begin after his death, and dyed, and his companion survived him, and agreed to be a good Lease against the Survivor, notwithstanding the Contingency. And he conceived that this might be released, and that it is not like to contingent actions, inasmuch that it is a release of right in Lands, see 5 *H.* 7. 31. b. *Colts Affise*, where it is said, if Lord, Mesne, and Tenant are, and the Mesne is forejudged by the Tenant, and after the Lord releases to the Tenant, and after by *Parliament* it is enacted that the fore-judger shall be void, yet the release shall be good against the Lord, and so of actions by *Executor* before Probate: and 14 *Ed.* 3. *Barr*, Release of Dower by *Fyne* doth extinguish it: and *Althams* case 8 *Coke*, if it be made to the Tenant of the Land, that shall be a Barr. And 21 *H.* 7. fol. the last, Release to a Patron in time of Vacation shall be a Barr in annuity brought against the Incumbent: and if the Lessee for years be outed, and the Disseisor makes a Lease for years to a stranger, and the first Lessee release to them both, this is good, as it is 9 *H.* 6. and yet regularly such release is not good without privity: But inasmuch that it is of right to the Land, and to one which hath possession, it is very good. So Release by Copy-holder, extincts his Copy-hold right, as it is resolved 4 *Coke*, amongst the Copy-hold cases, and yet hee agreed that some possibilities cannot be released, as in *Albays* case, power of Revocation, if it be not to the Tenant of the Land, inasmuch that this is a meer possibility. So if an annuity depend upon a condition precedent, but where the returning of the estate is to the party himselfe, as in *Digges* case, 1 *Coke* 174. a. And also the release in this case is the more strong, inasmuch that the estate in this is recited, as in the case of 44 *Ed.* 3. in release of Ayde. And so he concluded, that admitting there be no election and execution of the Legacy by the acceptance of the Release, then the title of the Defendant is good, and if it be a good election & execution: Yet he conceived that all the rearm remains in the first *Devisee*, and that the remainder is destroyed

destroyed by the release, and so prayed Judgment for the Defendant, and so it was adjourned.

*Pasche 1612. 10. Jacobi, In the Common Bench.*

*Manley against Jennings.*

Debt by Obligation.

Request is necessary for his Rent, though that he have a bond for performing Covenants.

*Nichols.*

**I**N Debt upon an Obligation, with Condition to performe, observe, fulfill, and keep, all *Covenants, Grants, Articles, Payments*, contained in a Lease, &c. The *Lessee* doth not pay the Rent at the day, and the *Plaintiff* without making of any request, begins a Suit upon the Obligation; and upon this matter pleaded in Barr, the *Plaintiff* replied that he was not demanded, and upon this the *Defendant* demurred: And *Harris Serjeant* for the *Defendant* argued, that when any penalty is annexed to a payment of the Rent, be that annexed to the estate, or otherwise, yet it ought to be requested, and without request to pay it, no penalty shall be incurred, as in 22 H. 8. 57. a. b. by *Newton, Ashton, and Port*, where a difference is taken between an Obligation taken for payment of Rent generally, without any relation to a Lease, and where it is only for performance of *Covenants*, and Issue taken upon the request, and after demurrer joyned, and the question if the *Lessee* ought to tender it, 14 Edw. 4. 4. accordingly: And in 21 Edw. 4. 6. a. b. *Pigott and Bryan* agreed that there shall be no penalty nor Obligation forfeited, without request, where the Obligation is for performance of *Covenants*, and not precisely for the payment of Rent, and so he concluded, and prayed Judgment for the *Defendant*.

*Nichols Serjeant* for the *Plaintiff*, conceived that the *Lessee* ought to make tender upon the Land to save the penalty, and this shall be sufficient: and the *Lessor* need not to make request, and this is the Obligation for performance of *Covenants*, for this doth not alter the nature of the Rent; but if it be for payment of Rent precisely, there the *Lessee* ought to seek the *Lessor*, or otherwise for non payment, he shall forfeit his Obligation, for there tender upon the Land shall not excuse him. And for that if a man makes a Lease for years, rendering Rent at *Michaelmas*, with *nomine pene*, if he not payed within 10 dayes after *Michaelmas*, and within the 10. dayes, and these differences appear, and are agreed in 22 H. 6. 57. and 6 Edw. 6. *Brooke* tender 20. And he conceived that the Books of 14 Ed. 4. 4. 20. Ed. 4. 6. and 11 Ed. 4. 10. depends upon these differences, that is, that a man shall not distrain for Rent charge without Request, inasmuch that it is as a Debt which is due upon Request, and admit that the case were that a man made a Lease for years, the *Lessee* covenants to pay the Rent at the day with a *nomine pene* in default of payment of that, and

and after the Lessee assigns his Interest to one which Covenants to pay the Rent, and performe all the Covenants in the Lease, he demanded in this case who shall make the request, that is, the first Lessor or the Lessee, inasmuch that it is small to the Assignee of them both, and so many Suits may arise upon that, and also he sayd, that it was ruled here upon a motion in arrest of Judgment, that in Debt upon an Obligation to performe Covenants there need not to be alledged demand, upon Solvit or non Solvit put in Issue, for it may be pleaded that it was tendered or payd, and so he sayd it is confessed by the Demurrer, that the Obligation is forfeited, and for that he prayed Judgment for the Plaintiff.

Coke cited Myles and Dragles Case, where a man was bound for performance of a Will, he need not to pay Legacy devised by that for which is no day assigned without request, so if the Obligation be for payment of Legacy expressly and no day assigned, and so it was adjourned.

Trinity 1612. 10. Jacobi, in the Common Bench.

### Gravesend Case.

**I**N Debt, the case was this, that is, the Port-reeve, Jurats and Inhabitants of Gravesend, brought Debt against one Edmunds a Water-man, which plyed the Ferry betwixt Gravesend and London, and counts that Gravesend and Milton are ancient Townes and next adjoyning to the River of Thames, and that the Inhabitants of these Townes have had time out of minde, &c. ancient passage from thence to London, and have used to make By-Lawes, and constitutions for the Government of that passage, and have provided Water-men, Steer-men, and Rowers for the said Passage, the which used time out of minde, to take of every Passenger and his Fardell two pence, and that for their maintenance, and ought to hold the Passage, if their benefit at this rate amounted to foure shillings, or more, and that the Queen Elizabeth by her Letters Patents under the great Seale of England, incorporated the said Inhabitants by the name of Port-reeve, Jurats, and Inhabitants of Milton and Gravesend, and this was in the tenth yeare of her Raigne, and also that they enjoyed the said Ferry without any Interruption, and that they held the tide and Ferry, and that the Port-reeve, Jurat, and twelve of the Inhabitants had power to make By-Laws and Constitutions for the government of the sayd Ferry, and that every Water-man should observe his turn, and also to impose Fines for the not observing of them, and that in the thirty seventh yeare of the said Queen Elizabeth, a Constitution was made by the then

Debt



*Port-reeve*, Jurats, and twelve of the Inhabitants of the said Town, inſomuch that many *Water-men* ply poore Paſſengers, before that the Barge was furniſhed, and ſo that many other Paſſengers were inforced to looſe their paſſage by the Barge, inſomuch that the paſſage did not amount to four ſhillings, ſo that they did not hold their tyde, ſo that the Barge which had ſuch prebeminence, that is, that no *Water-men* ſhall ply any Faire or paſſenger till the Barge had received ſo many of their paſſengers, by which they might receive four ſhillings at the Rate aforeſaid, and be removed from the Bridge at *Gravesend* unto the Land marke, and that if the *Tilthwaite*, or any other *Water-man* received any paſſenger before that the Barge beſo furniſhed, that he ſhould pay the ſayd *Port-reeve*, Jurats, and Inhabitants for the maintainance of the ſaid Barge for every paſſenger ſo received two pence, and ſo aſſigned breach of the By-Law in the Defendants, and that he had received ſo many of the paſſengers before the Barge was furniſhed, which amounted to as much as is demanded, by which Action accrued to the Plaintiff to demand it, to which the Defendant pleads that he oweth nothing to the Plaintiffs in manner and forme as they have demanded it, and by the Jury at the Barr it was found for the Plaintiffs, and after that upon motion in the behalfe of the Defendant, the Judgment was arreſted, and now at this day Judgment was prayed for the Plaintiffs.

By *Dodrige Serjeant of the King*, and he conceived that the cuſtome was good, notwithstanding that it was alledged in the Inhabitants, and he ſayd it was no preſcription but Cuſtome, and it is declared to be a good and laudable cuſtome and uſage by the Statute of 6 H. 8. Chapter 7. *Raſtall Paſſage* 8. and he agreed that Inhabitants cannot preſcribe to have matter of benefit, but to have matter of Eaſe, he conceived they might very well, as it is 15 Ed. 4. 29. 22 H. 6. *Preſcription* 46. 18 Ed. 4. 2. 18 H. 8. 1.

Secondly, As to the Objection, that the living of the other *Watermen* which are not employed in the Barge is by that abridged, and that when the *Water-man* is willing to carry, and the Paſſenger to be carried by him, it is no reaſon that a By-Law ſhould abridge this voluntary act of a man, upon which his lively-hood depends, he ſayd that ſo it is not, for nothing is challenged by the By-Law, but only prebeminence, and that provision be made for the Poore, which is for the publick good, for every one may go with any that he will paying two pence to the Barge or after the Barge is furniſhed paying nothing, and he conceived that the Liberty of the ſubject ought to be ſo abridged, but not altogether aboliſhed, as it is agreed in the Arch-Biſhop of *Yorke* Case in the Register in the Writ of *Treſpaſſe* fol. 105. b. c. 8 *Coke* 125. a. *Waggoners Case*, 8 Ed. 3. 37. a. 3 Ed. 3. 3. Where the Biſhop of *Yorke* claimes in the Mannor of *Ria*

not such liberty, that is, that he and all his Predecessors time out of mind, &c. have had a custome that none in the said Town ought or had accustomed to use the office or mistry of a Dyer, without Licence of the said Arch-Bishop or his Bayliff of the said Town: And also he cited a case in the Register, where the Abbot of Westminster prescribed to have a faire in Westminster upon Saint Edwards day, and for ten daies after: And that no Citizen nor other in London, during that time should sell any thing in London, but in this faire, and after the Abbot remitted this priviledg, and had of the Citizens of London for that; one thousand five hundred pound: And so it was adjudged in Sir George Farmers Case, for a bake-house in Toffier, and that none shall bake any Bread to sell, but in his bake-house and good: And so he conceived that Custome may be restrained all passengers till the Barge be furnished, as in 2. Ed. 3. 7. Grant that all Ships, laded and unladed in such a Haven, shall be laded and unladed in such a place, and a good grant, notwithstanding that it restraines all people to a certaine, and if this be good by grant, then a Forfeiture shall be good by custome; and to the other objection, that this custome shall only bind the Inhabitation and not strangers, he conceived that custome might eye strangers that came into the said Town very well, as it is agreed in 22. H. 7. 40. So the By-Law shall bind strangers, when it is only for Adu to be made within the Town and for the publike good, as it is agreed in the 44. Ed. 3. 13. and 8. Ed. 2. assise. 413. ordinance against him which estops passage by water and good, and so he agreed in the Chamberlaine of Londons Case, that By-Law made in London shall bind all, as well strangers as Citizens, which sell any Drapery in the Hall there, though that they Inhabite in any place out of the City: And also he said that the Barge-men which have the losse, shall have the benefit, for they shall have the two pence for every one that passes otherwise, before that they are furnished, and this is recompence for them which are tyed to perpetuall attendance, and he conceiveth that the demand is very well made, notwithstanding that the duty accrues from many times, for he hath carried so many men at one time and so many at another, the which in all amounts to the sum demanded: And so he concluded, and praised Judgement for the Plaintiffs.

Wynch Justice, that the Count is not good, for the Plaintiffs have not alledged that they have used time out of mind, &c. To maintaine Ferrey, but only that they have used to make Constitutions, Secondly, it is not alledged that they onely have used to maintaine Ferrey, and if they cannot prescribe in the sole using of that, and to exclude others, then others may use that as well as they, being for the publick good, for how shall they be punished, if

Wynch.

that they do not use and maintaine; at the Common Law the Inhabitants of a Towne shall be punished for not repairing of a Bridge, or high Way, the which may be maintained by the Inhabitants together, and if they do not do it, then others may do it, as well as others may repaire high Waies or Bridges, as those which have used to repaire them, as a common Host shall be punished in Eyre if he refuse to lodge any man, and yet he which he refused to lodge, may have an Action upon the Case for the refusal: Also the Patent gives the forfeiture to the ~~Part-reeve~~, but the By-Law doth not make any mention who shall have it, and he conceives that it shall not be as upon the Statute of 2. Ed. 6. Which gives penalty for not setting forth of Tythes, but doth not appoint who shall have them: and this was adjudged to be to him which ought to have the Tythes, but this cannot be so here, insomuch that it is against the Grant, and agreed that a stranger shall be bound by By-Law, where it is for the publick good, but not otherwise, and also the custome that these Bardge-men shall have the preheminence, may be good, as well as custome that the poore of such a Parish shall have common in such a place till such a day, and then the others, and so in this case; and so he concluded that Judgement shall be Arrested.

Warburton.

Warburton Justice conceived that the Count is good, and that the Inhabitants may prescribe very well, as 47. Affis. four Townes were charged for the repaire of a High way, and so may the two Townes for the Ferrey, that he intended to be high way upon the water, and also he conceived that this is inquirable in Eyre, and also by the Justices of the Kings Bench, and now by the Justices of Assises by Indictment by the name of Inhabitants: The which may be as good an Action upon the Statute of Winton against the Inhabitants of the Hundred, and so he conceived, that in this case the Inhabitants of Milton and Gravesend may be punished by Indictment if they do not repaire the Ferrey, and that the King there this day may erect a Ferrey in place where it is necessary, for the King may erect office which is for the benefit of the Common Wealth, but not to charge the Common Wealth: And that if any will passe in his owne Ferrey, without carrying of another, this is no breaking of the By-Law; and so he concluded, that Judgement should be given for the Plaintiffs.

Coke chiefe Justice seemed the contrary, for he conceived it is not shewed in the Count to whom the Ferrey belongs, for the owners of that are not mentioned, the which it ought: And yet he agreed that a Ferrey may be without owner, as it is agreed 12. Ed. 4. 8. Insomuch as this is locall and need not any Agent, but out of Lette and Ferrey otherwaies it is, for there ought to be Agent, or otherwise the Ferrey should be of no use, and for that there ought to be an owner.

Secondly



Secondly it is alledged that *Infra Easterne Townes*, there is such a custome that the Inhabitants may make constitutions, and that the Inhabitants shall maintaine a *Ferry*, but not that there was a *Ferry*, but that he conceived it might be good, infomuch that it is not traversable.

Thirdly what Action the Inhabitants may have, if they be disturbed of it, for this is no easement, and they have no Estate of Inheritance, and for that the Prescription by the name of Inhabitants is not good, for they cannot have Estate, and to the *Sa- tute of 6. H. 6. chapter 7.* Which saith, it is a laudable custome and usage that a Barge shall be maintained, but not that Inhabitants shall maintaine that, nor those incorporate, so that the *Statute* doth not make them capable of such a thing, for which a Writ of right, and assise by the *Statute of Westminster 2. lies.*

Fourthly, That the custome and the Patent are repugnant, for by the custome the Barge hath not any *preheminance nor precedence*, but equall liberty was to all water-men to carry what passengers that they could; and with that also agreed the *Statute of 6. H. 6.* And then if the custome were not so, this cannot be made by the grant of the *Queene*, nor by the By-Law, for this is the liberty of the Subject, the which cannot be abridged nor restrained by them, for if the King may grant such *preheminance here*, so may he do in all other *Ferries* and places, and also in the practise of the Law, to have *preaudience* in this Court, and in all other Courts of Justice: And so should it be also of Butchers and Bakers, and all others which used buying and selling: And he said that the King hath pre-emption of time in some places, but this is not by his prerogative, but by the custome of the place; And he agreed that custome in sub-ject may have *preemption*, but not by the Kings grant, for the King cannot grant that to another that he himselfe hath not by his pre-rogative, and perchance he which hath such grant, will not come to Market, till all the Market be ended, and he conceived that the River of Thames is so publick, that the King cannot restrain that by his grant, no more then he can grant *preheminance* to a Coach- man to carry people into the Streets of London: The which is ad- judged upon the matter in the *50. of Ed. 3. Toll. 2.* Where the King grants Toll for every one which passeth by a Common way: And agreed that it was not good if it be in a Common Way, or in a Com- mon River, for as it is resolved in the *22. assis. 93.* Every common River is as high *Street*, and Common Waies and the passengers Way as the water increases, and the Thames is a branch of the Sea and a common *Street*, as it appears by *Bracton fol. 8. 5.* The Plaintiffs have brought their Action by the name of Corporation of *Port- reeve*, Jurats, and Inhabitants of *Milton and Gravesend*; and they are:

are incorporate by the name of *Par-secus*, Jurates, and Inhabitants of *Gravesend*, possessors of Ships, the which words are left out in the name, by which the Action is brought, so that the By-Law is not made by the same name, by which they are incorporate, nor the Action brought by the same name: And yet he agreed that they might make a By-Law according to the grant, without calling all the Inhabitants to it.

Sixthly, He conceived that the constitution is not pursued, for the constitution is; that if any Water-man carries any passenger willing to go by the Barge, that such Water-man shall pay for every such passenger two pence. And it is not averred that the passengers which the Defendant hath carried, were willing to be carried by the Barge, and so not pursued.

Seventhly, The Constitution is further that no Wherry-man shall carry any passenger, before the Barge be fully dismissed and transmitted, and this is not good, for it may be the Barge will not passe to *London* at all this Tyde, and for that it ought to be averred that the Barge departs in convenient time after *that* it is furnished, for otherwise custome that none shall put his Beasts into such a place, till the Lord hath put in his Beasts is not good, for it is resolved in 2. H. 4. 24. And the reason is, insomuch that it may be, that the Lord will not put in his Beasts at all: And to the objection that the By-Law shall not bind a stranger, he conceives that if all other circumstances had been concurrent; that had been very well, insomuch that it was within the place where they had power to make By-Lawes, and also for the publick good, and this as well as the custome of *Forraine* bought, and *Forraine* sold, the which is only for strangers: And to the objection, that they are severall owners of severall Barges, and for that ought not to joyne in this Action, he saith this doth not appeare by the Count, but it is said that they were possessed, and for that they shall be intended Joynt Owners, and so he concluded, that Judgement shall be arrested.

Trinity 10. Jacobi, 1612. in the Common Bench.

Downes against Shrimpslaw, Trin. 9. Jacobi, Rot. 334.

**I**N action of Trespasse for Assault and Battery, the case was this: The Plaintiff in his Count supposeth the Trespasse to be made the first day of May, 8 Jacobi, at such a place. The Defendant pleads that the Plaintiff the same day would have assaulted and beaten him, and that the Defendant laid his hands upon him to defend himselfe, and if any hurt came unto him, it was by his own wrong, the which is the same Trespasse for which the Plaintiff hath complained him.

The

The *Plaintiff* replies, of his own wrong without such cause, upon which Issue was joyned; and at the *Nisi prius* for Justification, the *Defendant* produced Witnesses, which proved an assault to be made by the *Plaintiff* upon the *Defendant* long time, that is, by the space of a year before the day contained in the Count, and that at this time the *Defendant* to defend himselfe, hath assaulted the *Plaintiff*: And upon this Evidence the *Plaintiff* demurred, inasmuch that this proves an assault made at another day then is contained in the Count, and the *Defendant* by pleading hath confessed an Assault and Battery made upon the *Plaintiff*, the day contained in the Count, and now upon Evidence proves his Justification at another day: and if this Evidence were sufficient to prove his Justification, was the question. And if by this pleading the day be made materiall, in which it was agreed by the Court, and Councell also, That if the *Defendant* had pleaded not guilty, the day had not been materiall. But the *Plaintiff* might have given in Evidence any Battery before the day contained in the Count, or after before the action brought, and this is sufficient to prove his Declaration: but the Parties, that is, the *Plaintiff* by his Count and Replication, and the *Defendant* by his Justification, have agreed of the day: And for that if they may now vary from that it was moved, and so it was adjourned.

Trin. 10. Jac. 1612. in the Common Bench.

Laury against Aldred and Edmonds.

IN Debt against the *Defendants*, as Executors of William Aldred, dead, upon an Obligation made by him in his life time, of 50. l. The case was this, one of the *Defendants* confessed the action, the other pleaded that the *Testator* dyed such a day, and that he intending to have letters of Administration, caused the Corps of the *Testator* to be buried, and his goods safely to be preserved and kept, and that after administration was granted to him by the Arch-Deacon, and that after that one Harnego brought action against him as Administratrix by letters of Administration committed to her by the Commissary of the Bishop, being Ordinary there, and recovered, and averred that this was a true Debt, and that he had no goods which were the *Testators*, besides the Goods and Chattels which did not amount to the said Debt, and so demanded Judgment if action, and upon this the *Plaintiff* demurred in Law.

Davis Serjeant argued for the *Plaintiff*, that the *Defendant* ought to have confessed and avoyded, or traverse the point of the action, and not conclude Judgment if action: See 1 Eliz. Dyer 166. 10. When intermeddling made men Executors of their owne wrong, that

Debt against  
Executors.

Davis.

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is, when he meddles without any colour of title or authority, as receiving Debts; and disposing the goods to his owne use: But if a man administer about the Funeralls, or he made a Coadjutor, or Overseer, this shall not make him Executor of his own wrong, or by reason of a Will which is after disproved by probate of one Letter: and in these cases, if he be charged as *Executor*, he ought to plead speciall matter, without that, that he administered in other manner: and in 20. H. 7. 27. a. 28. b. adjudged in Debt against one as Executor, which had Letters, *ad Colligendum bona defuncti* only, which pleaded the speciall matter, without that, that he administered any other way, and other manner was out of the pleading; for he did not administer in any manner with Intermeddling by the letters *ad colligendum*: and 9 Ed. 4. 33. b. If an action be brought against an Executor of his owne wrong, and after administration is committed to him by the Ordinarie, this shall not abate the action: upon which Books he inferred, that the *Defendant* ought to have traversed, that he administered as Executor, and insomuch that hee hath pleaded that he hath not so pleaded, the plea was not good; and also insomuch that he hath pleaded, that he hath no goods of the *Intestate* besides goods which doe not amount, &c. And this is uncertain, and not good, for he ought to have shewed what goods he had in certain, and the value of them, insomuch that they remain as *Asses* in his hands, and so he concluded, and prayed Judgment for the *Plaintiff*.

Barker.

*Barker* Serjeant for the *Defendants*, argued, that though that the action in which *Harnage* recovered, was begun after the action now hanging, yet insomuch that judgment was first had in that: now that shall be preferred otherwise before Judgment, for till Judgement the elder action shall be preferred. And he conceived, that if the Writ was abateable, and the *Defendants* would not abate it by plea, that shall not prejudice the *Plaintiff* which is a stranger, and doth not know if these *Defendants* are *Executors*, or *Administrators*, as it is said by *Danby*, 9 Edw. 4. 13. And he conceived that the plea is good, that the *Defendants* have not goods, besides the goods, which do not amount, &c. And divers presidents were cyted by him to this purpose, as *Trin.* 18. Eliz. Rot. 1405. between *Blanchson* and *Frye*. *Hillary*, 40 Eliz. Rot. 902. *Smalpeeces* case: and *Trin.* 44 Eliz. Rot. 1900. between *Goodwin* and *Scarlet*, in all which the pleadings were all one with the plea in question, and no exceptions taken to that: and infinite other presidents may be shewed in the point, for which cause he demanded Judgment for the *Defendants*.

*Coke* cheife Justice seemed, that in an action brought against one as Executor, he may plead that Administration was committed to him for such intent that the dead dyed *Intestate*, and demands Judgment if action without traverse, that he was Executor, and with this agreed

agreed, 1 Ed. 4. 2. a. 20 H. 6. 23. And so if the Ordinary be charged as Executor, he may plead that he administred as Ordinary without traverse, that he was Executor, but only shewed that the party dyed *Intestate*, and the Plaintiff ought to reply, that he made a Will, and the Defendant proved that, and traverse that he dyed *Intestate*, and with this agreed 9 Edw. 4. 33. and 1 Edw. 4. 11. And if an action be brought against Executor of his own wrong, hee may plead that *administration* is granted to such an one, and the Party dyed *Intestate*, and demand Judgment if action, for he shall not be charged for more goods then came to his hands: But if a man administer of his own wrong, and after rightfull *administration* is committed to him, yet he may be charged as Executor of his own wrong, insomuch that Right of action is attached in him. But this seems for the goods that he hath administred before rightfull *administration* committed unto him. And he cyted 14 Eliz. Dyer 305. b. where in debt brought against one as Executor, which pleads never Executor, nor ever administred as Executor; and the Plaintiff replies, that he administred as Executor of the Will, &c. and so to Issue. And in Evidence the Defendant shews Letter of *administration* to him committed of goods of the dead, by which he administred them, and before that he did not administer, and this seems there to be good Evidence, but the Book was *Quere* of that, and for that he would rather plead that in abatement of the Writ, and so the Book inclined also. And he conceived here, that the meddling with the goods here by the Defendant, as Administrator, made him Executor of his own wrong, insomuch that it was for Funerals, and when it is a work of *Charity*, and the other is to preserve them. And the Defendant hath not conveyed himselfe to be Executor, insomuch that he said, that *administration* was committed to him by an Arch-Deacon, and he doth not say that *Administration* of right belonged to him, so commit, insomuch that hee hath but a sub-ordinate Jurisdiction: And the Common Law doth not take notice, that he, nor no other but the Ordinary hath such power, and for that the power of all which have such subordinate and peculiar Jurisdiction is pleaded, that ought to be shewed, as it seems by 1 Ed. 4. 2. a. b. 22 H. 6. 23. And the rather when this is pleaded by the Administrator himselfe, which ought to have notice of that, and make title to himselfe; and if so it be, then he conceived that the Recovery by *Hornego* was void, and so all the goods confest remain as *Assets*. Also he conceived, that if the Executor allow a *Writ* to suffer Judgment to be had against him, upon a *Writ* which is abateable, he shall not have allowance of that, but this shall be returned as *Devastavit*, as in 10 Edw. 3. 503. a. If the Tenant vouch when he might have abated the *Writ*, he shall lose the benefit of his *Warranty*: So here and Com. *Manwells* case, 12. a. 23

H. 8. 12. 6. Also he conceived, if a man be charged as *Administrator* where he is no *Administrator*, he cannot plead that he never administered as *Administrator*, but he ought to traverse the Commission of Administration, as it appears by 21 H. 6. 23. And it seems also to him, and by 9 Edw. 4. 33. that if a man be an *Executor* of his owne wrong, and after administration is committed to him, and he is charged as *Executor*, after administration committed, that the *Writ* shall abate, otherwise if administration be committed, hanging the *Writ*. So if a man be made *Executor*, and hee not knowing of that, sues letters of Administration, he shall be named *Administrator*, and if after when he hath notice of the Will, he proves it, then he shall be impleaded by the name of *Executor*; for in such manner as the power is given to him by the Bishop, he shall be charged: and it seemes though that he plead where he is *Administrator*, and is sued as *Executor*, or otherwise in such manner, that hee might have abated the *Writ*, or suffer Judgment; yet the *Writ* shall abate: and he intended also, that *Executor* of his owne wrong, might pay debts due to another, and shall be discharged, and shall not be charged with more then he hath in his hands. And if two *Executors* are joyntly sued, and one confesse the action, this shall bind him and his companion also for so much as he hath in his hands. But if an *Executor* of his own wrong confesse the action, this shall not prejudice him which is rightfull *Executor*, and so he conceived that judgment ought to be given for the Plaintiff.

Warburton.

Warburton Justice conceived that the Barr is good, notwithstanding that he did not shew, that the Arch-Deacon had power to grant Administration, insomuch it is no Inducement and the Defendant doth not rely upon it, as Littleton saith, in Trespasse where the Defendant pleades that it was made by two, and the Plaintiff releases to one, and if the Defendant pay due Debts it is not materiall, whether he have Authority or not, though that it be in another respect: As if a man be Indicted of man-slaughter and acquitted, and after is Indicted of Murder by the same man, he may pleade another time acquitted, insomuch that these are matters of substance: But here it is but of forme, and then if it be not shewed it is not materiall: But the matter upon which he relied was, insomuch that the Action was brought against two *Executors*, and one hath confessed the Action: And he intended without question, that if this shall bind his companion, and for that he will not dispute the other questions, but deates his opinion chiefly, that the Plaintiff ought to have Judgment against both these Defendants upon the confession of one, and this shall bind his companion: Wynch Justice conceived that the Plea is good by *Administrator* without traverse, insomuch that it is to the *Writ*, as it appears by 9 Edw. 4. 33. 37 H. 6. 32 H. 6.

Wynch.



1. Ed. 4. 2. 30. Ed. 5. And he conceived that the burying is not any Administration, nor the taking of the goods into his custody to preserve them, no more then in Trover and Conversion, when a man takes the goods for to preserve them: And he agreed that where a man intrudes himselfe to goods by Administration committed by any but by the Bishop, he ought to pleade specially, that he which committed it had power to doe it: But here it is not so, but only conveyance, and for that need not here such precise pleading of that, inasmuch it is only execution of Administration, and for that it is good without intitling the Arch-Deacon: And he agreed that an Executor of his owne wrong may pay Debts due to another, and shall be discharged: And he agreed also that the Confession of one Executor shall bind his Companion, and that Judgement shall be given upon that for the Plaintiff: And they all agreed that the pleading, that the Defendant hath no goods, besides the goods which do not amount, &c. it was not good, and for these causes they all agreed that Judgement ought to be given to the Plaintiff.

Trinity 10. Jacobi, in the Common Bench.

Tyrer against Littleton 9. Jacobi, Rot. 299.

**I**N Trespasse for taking of a Cow, &c. Upon not guilty pleaded by the Defendant, the Jury gives speciall Verdict as it follows, that is, that the Husband of the Plaintiff was seised of eighty Acres of Land, held of the Defendant by Harriot service, that is, the best Beasts of every Tenant which died seised, that he had at the time of his death, and that the Husband of the said Defendant, long time before his death, made a Feoffment of that Land in consideration of marriage and advancement of his Son, to the use of his Son and his Heires, with such agreement, that the Son should redemise to his Father for forty yeares, if he so long lived, and that after the marriage was had, and the Son redemised the Land to his Father, and the Father enjoyed that accordingly, and paid the Rent to the Lord, and after died, and that the Plaintiff had no notice of his Feoffment, and that the Husband at the time of his death was possessed of the said Cow, and that the Defendant took it as the best Beast in name of Harriot, and also found the Statute of 13. Elie. of fraudulent conveyances to deceive Creditors, and so praised the direction of the Court, and this was agreed by the Plaintiff aforesaid.

Nicholls Serjeant, first that all conveyances made upon good consideration and *Bona Fide* are by speciall *Proviso* exempted out of the

Trespasse:

Harriot:

Nicholls.

*Statute of 13. Eliz. chap.* And he conceived that this is made upon good consideration, and *Bona Fide*, and for that it is within the said *Proviso*, and also he said, that as upon the *Statute of Marlebridge* there is fraud apparent and fraud averrable, as it appears *12. H. 4. 16. b.* Wherein ward the Tenant pleads that his Father levied a Fine to a stranger, the Lord replies that this was by Collusion to re-enscuff the Heire of the Tenant at his full age, and so averred that to be by Collusion to our the Lord of his Ward, and this is fraud averrable: But if the Tenant had enscuffed his Tenant immediately in Fee-simple, this is apparent without any averment, and the Court may adjudge upon it: And so upon the *Statute of 27. Eliz. chap. 4.* it appears by *Burrells Case*, that the Fraud ought to be proved in Evidence, or confessed in pleading, or otherwise this shall not avoid conveyance, for it shall not be intended, *6 Coke 78. a.* and see *33. H. 6. 14. b.* *Andrew Woodcocks* case, upon which he inferred, that this is but a fraud averrable, if it be a fraud at all, and of this the Court could not take notice, if it be not found by the Jury, and he said upon the *Statute of 32. H. 8. Of Devises*, as it appears by *Knights Case*, *8 Coke*, and *12. Eliz. Dyer 195. 8, 9, 10, 10, 11, 12, 13, 14, 15, 16, 17.* And so he concluded, and praied Judgement for the Plaintiff.

Harris.

Harris Serjeant for the Defendant, argued that the Circumstances which are found in the speciall Verdict are sufficient to satisfie the Court that it is fraud, for as well as the Court may give direction onto the Jury upon Evidence that it is fraud and what not, as well may the Court Judge upon the special matter, being found by special Verdict at large, as in *9 El. Dyer 267. and 268.* that is, the special matter being found by special verdict at large, as in *9 El. Dyer 267. 268.* that is, the special matter is found by Inquisition upon *Mandamus*, and leave to the Court to adjudge if it be fraud or not, and in *12 El. 294. and 295. 8.* the special matter was found by Jury upon *Eligis* directed to the Sheriffe, and by him returned to the Court: And in *Trinity 27. Eliz.* between *Saper and Jakes* in Trover the Defendant pleades not guilty and gives in Evidence as assignement of a Tearme to him with power of revocation: And the Court directed the Jury, that this was fraudulent within the *Statute of 27. Eliz.* to defraud a purchaser, and in *Burrells Case 6. Coke 73. a.* before the fraud to the Court upon Evidence to the Jury, and the Court gave direction to the Jury that it was fraud, and that upon the Circumstances, which appears upon the speciall Evidence: And so in this case he conceived, that insomuch the circumstances appear by the Verdict, that the Jury may very well adjudge upon it; and so he concluded, and praied Judgement for the Defendant.

Coke.

Coke cheife Justice that the *Statute of 13. Eliz.* Doth not aid the

the Defendant, inſomuch that the Feoffment was made for good conſideration, and for that ſhall be within the ſaid *Proviſo*, for if that ſhall be avoided at all, that ſhall be avoided by the *Statute of Marlebridge*, which is only affirmance of the Common Law, and this is the reaſon, that notwithstanding the *Statute* ſpeakes only of Feoffment by the Father to his Son and Heire apparent, yet a Feoffment to a Coſin which is Heire apparent, is taken to be within the *Statute*, and in the 24. of *Eliz.* in *Sir Hamond Stranges Caſe*: It was adjudged that if the Son and Heire apparent in the life time of his Father, purchaſe a Mannor of his Father for good conſideration, this is out of the *Statute*, and ſo it was adjudged in *Porredges Caſe*; alſo he ſaid that the Law is an Enemy to fraud, and will not intend it being a conveyance made for conſideration of a marriage to be fraudulent, no more then if the Father had made a Feoffment to the uſe of a ſtranger for life, the remainder in fee to his Son and Heire, the which is not within the *Statute of Marlebridge*, as it is agreed in *Andrew Woodcocks Caſe*, 33. H. 6. 14. b. Alſo he conceived, that the Feoffment in conſideration of marriage, naturall love to his Son, and that the Wife of the Sonne ſhall be Indowed, and that the Son ſhould redemiſe that to his Father for forty yeares, if he ſo long lived, and that the Father ſhould pay the Rent to the Lord, theſe he intended to be good conſiderations, and for that ſhould be within the ſaid *Proviſo* of the *Statute of 13. Eliz.* otherwiſe if it had been to defraud Creditors: But if it had been to ſuch intent, that is to defraud Creditors, this ſhall not be extended to other intent, that is to defraud the Lord of his Harriot: And in the 28. of *Eliz.* it was adjudged in the Kings Bench, if a man make a Feoffment in Fee to the uſe of himſelfe for life, remainder to his Son in tayl, with divers Remainders over, with power of Revocation, and after bargaines and ſells to a ſtranger upon condition, and after perſormes the Condition, that yet the firſt conveyance remaines fraudulent, as it was at the time of the making of it: But this is only as to the purchaſor and not as to any other. And in *Goodhers Caſe*, 3. *Coke* 60. a. In debt againſt Heire which pleads nothing by diſcent day of the Writ purchaſed, the other joynes Iſſue, and gives in Evidence fraudulent conveyance, and upon ſpeciall Verdict adjudged that it was very good: See alſo 4. *Coke* 4. b. c. *Vernons Caſe*, the Colluſion to have Dower and Joynture alſo: And ſo he concluded that Judgement ſhould be given for the Plaintiff.

*Warburton* Juſtice agreed that the fraud ſhall not be intended if it be not found, no more then if a man grant an Annuity to another, *Quam diu ſe bene geſſerit*, in Annuity, for that he need not to aver that he hath behaved himſelfe well, for this ſhall be intended,

253 *Elfr.*  
Dyer 193. a.  
*Hvensfords*  
caſe according-  
ly.

*warburton.*



ded, if the contrary be not shewed of the other party: So here in-  
 much that it is not found to be fraudulent, it shall be intended to  
 be *Bona fide*: And he agreed that if it had been fraudulent at the  
 first: If the Son had made a Feoffment over in the life of the Father,  
 as it is agreed in *Andrew Woodcocks Case*, 33 H. 6. 14. that then the  
 fraud is determined: So here when the Son hath made a Lease to his  
 Father, this determines the fraud if any be, and so he concluded that  
 Judgment should be given for the *Plaintiff*.

*Wynch.*

*Wynch* Justice agreed, inasmuch that it is expresse consideration  
 found by the Verdict, and for that other consideration shall not be  
 intended, and also that it shall not be intended that the Conveyance  
 was made to defraud or to deceive the Lord of such a *Pecchell*  
 as *Harriot* is, which is of small consequence; but if it be a fraud  
 within the *Statute of 27 Eliz. apparent*; that is, if it containe pow-  
 er of revocation, which is declared to be apparent fraud by the  
*Statute*, the Court may take notice of that without any averment;  
 And he saith, That in the 2. and 3. *Eliz. Dyer, Wainsfords Case*,  
 193. a. and 9 *Eliz. Dyer* 267, 268. there is no averment of fraud,  
 but expresse Issue joyned upon the Fraud, and for that he need not  
 any other averment: And so he concluded also that judgement  
 should be given for the *Plaintiffe*, and so it was Ruled accordingly,  
 if the *Defendant* did not shew other matter to the contrary at such  
 a day, which was not done.

Trinity 10. Jacobi 1612. In the Common Bench.

Strobridge against Fortescue and Barret.

*Release.*

**I**N a *Replevin* the case was this, A man seised of Lands in *Fee*  
*devises Rent out of it with clause of Distress and dies*, his Son  
 and Heire enters and dyes, the Rent is behind, the Son of the  
 Son dyes, and his Son enters and makes a Feoffment to the Plain-  
 tiff, and the *Devisee of the Rent*, releases all Actions, Debts,  
 and Demands, to the Feoffor, and after distraynes the Beasts of  
 the Feoffee, for the Rent behinde, before the Feoffment, and it  
 seemes the Release is not good, inasmuch that the *Devisee* had no  
 cause of Action at the time of the Release made, against him to whom  
 the Release is made, nor Demand against him, otherwise if the Re-  
 lease had been made to the Feoffee, for he was subject to the distress,  
 and this is a demand.

Trinity

Trinity 10. Jacobi. 1612, In the Common Bench.

## Case of Cinque Ports.

**N**OTE that *Coke* said, that it hath been adjudged by three Cinque Ports, Judges against one in a Case of Cinque Ports, that the Cinque Ports cannot prescribe to take the Body of a Freeman in *Withernam*, as they use for another; for this is against the Statute of *Magna Charta*, *Quod nullus liber homo Imprisonetur nisi per Legate Judicium*, and also against the liberty of a Subject, but they more inclined that they might take the Goods of one in *Withernam* when another is arrested, and them retain, and this seems the more reasonable Custome and Prescription.

The Case was, Tenant for life, the Remainder for life with warranty, the first Tenant for life was impleaded, and he vouches him in Reversion, but he first prays in aid of him in Remainder, and if this aid prayer shall be granted this was the question.

And it seems by *Nicholls Serjeant*, that it shall not be granted, see 11 H. 4. 63. Where it is agreed that if a man makes a Lease for life, Remainder for life, Remainder in fee, and the first Tenant for life hath ayde of him in remainder for life, and he in Fee jointly, and 44 Edw. 3. 20. in Trespasse against a Miller which takes Toll where he ought to grind Toll-free; the Defendant saith that ? had the Mill for life, and that he is his Deputy, the reversion to W. in Fee, and prays ayde of the Tenant for life, and of the Tenant in reversion, and had it of the Tenant for life, and not of him in reversion, and this for default of Privy, as it seems to *Brooks*, Ayde 30.

*Haughton* conceived that it should be granted for Tenant for life, notwithstanding that he may plead any Plea, yet he doth not know what Plea to plead without him in reversion, but by the ayde, praying at the Estate shall be reduced into one, and the warranty shall come; and for that he conceived, that the first Tenant for life shall have ayde of him in remainder for life.

*Wynch* Justice conceived that ayde shall not be granted against the first Tenant for life, against him in remainder for life, for he conceived that ayde is alwaies to be granted, when the defects of him and his Estate which prays it, are to be supplied by him which is prayed; that this is the reason that he may have ayde of his Wife, and where there are many remainders, the first Tenant may have ayde of them all; otherwise where he is Tenant for life, the remainder for life, and the reversion expectant, for the Tenant for life cannot supply his defects; and with this agreed the expresse Booke of 11 Edw. 3. Fitz. Ayde 32. and so he concluded that it should not be granted.

Cinque Ports.

Tenant for life  
with warranty.

Nicholls.

Haughton.

Wynch.

Warburton

Warburton.

Warburton Justice doubted, and inſomuch that the granting of ayde where it is not grantable, is no error, but otherwiſe of the denying of that where it ought to be granted, he would be adviſed. But he conceived that the cauſe for which ayde is granted, is not the feebleneſſe of the Eſtate of him which prays it onely, but to the intent that they may joyne together, and one defend the other, for Tenant for life may plead ſome Plea, which he in reverſion may plead, ſaving the joyning of Iſſue in a Writ of Right, and he had a Manuſcript of the 11 R. 2. where Tenant for life, the remainder for life, the remainder for life was, and the firſt Tenant for life had ayde of them both in remainder, and ſo concluded.

Ayd granted.

Coke.

Coke cheif Juſtice ſaid ought not to be granted in this Caſe, inſomuch that he which is the firſt Tenant hath greater Eſtate then he in Remainder, for his Eſtate in Remainder is more Remote and uncertaine, and to the Book of 11 R. 2. He agreed, that the ayd was granted of all in Remainder, but there they in Remainder had Eſtate in Tayle, and he ſayd that ayd is to be granted in two Caſes, in perſonall Actions to maintain Iſſue, and when Tenant for life prays in ayd of him in Remainder or Reverſion, without which they cannot answer nor plead, nor Iſſue cannot be deduced, but ſo it is not here, for the firſt Tenant for life may answer and plead to the Iſſue, as well without him in Remainder for life, as with him, for if Tenant for life, Remainder in tayl, Remainder in fee, if the firſt Tenant for life be impleaded he ſhall have ayd of him in Remainder in tayl, otherwiſe if the Reverſion had been to the firſt Tenant for life, with a meſne Remainder in Tayle, 41 Ed. 3. 42 Ed. 3. 10 Ed. 3. And 11 Ed. 3. Receit 118. Tenant for life, Reverſion for life, Remainder in fee was, he in Reverſion for life ſhall be received upon default of the firſt Tenant for life, and if he will not, then he in Remainder in fee ſhall be received, and yet he ſhall not have Waſt, as it appears by 24 Ed. 3. for this deſtroies the firſt Eſtate; but the receit maintains and preſerves it, and he ſayd, that the 41 Ed. 3. Ayd. 32. before cited, rules this caſe, and ſo of 4 H. 6. And ſo he concluded, and inſomuch that Warburton doubted of it, it was adjourned.

Trinity 10. Jacobi 1612. In the Common Bench.

Yet Rowles againſt Maſon, See before 57.

nynch.

WINCH Juſtice argued that the Defendant is not guilty, and that the Plaintiff ſhall take nothing by his Writ, for he conceived that the verdict is uncertaine, inſomuch that it is not found that Livery and Seſſin was made upon the Leaſe for three lives of the Mannor



Mannor, but onely one *Memorandum*, that it was made in the house of the Lord, but it is not found that this House was parcell of the Mannor, but after it is found that the Lessee by force of this was seised, by which it is implied that it was very well executed, and this being in speciall verdict, would be very good, he conceived, there were two principall matters in the Case.

*Verdict uncertaine.*

First, Upon the Bargaine and Sale of Trees, if they be re-united to the Mannor, or remaine undivided.

Secondly, Upon the two customes, the which he conceived depend upon a question, for the first warrants the second.

And to the first, When a man devises a Mannor for three lives, and by the same Deed in another clause, bargaines and sells the Trees, and then insues the *Habendum*, and this is of the Mannor only, and limits Estate of that for three lives without mention of the Trees, hee conceived that the Trees passe before the *Habendum* absolutely, and it is not like to a Bargaine and Sale of a Mannor with Trees, or Advowson appendant, and here the purpose and intent appeares, that they shall pass together and as appendant: But in the first case they shall passe as a Chattell immediately upon the delivery of the Deed before any livery made upon this to pass the Mannor, and if Livery had never been made, yet he shall have the Trees, see 23 *Eliz.* 379. 18 *Dyer*, Where a man devises and grants a mannor and trees, *Habendum* the Mannor for one and twenty yeares without mention of the Trees, and yet by *Windham, Periam, and Meade, against Dyer*, the Lessee cannot cut and sell the Trees, for there was all in one sentence, that is, the grant of the Trees and the Demise of the Mannor, see the 3 *Coke Pexells Case*, how a Grant shall be construed, and where that shall be intended to pass Inheritance, and where to pass but a Chattell; where a man grants a Chattell and ten pound yearly to be payd, and in 7 *Ed. 4.* If a man hath Inheritance and a Lease in one Town, and he by one and the same Deed, gives, Grants, Bargaines and sells all to one, *Habendum*, the Inheritance to him and his Heires, this is no forfeiture of the Lease, insomuch that the Fee doth not passe of that, so in the Principall Case, *Fee-simple* passeth in the Trees, and *Free-hold* in the Mannor, and he conceived that by the Demise over, the Land and Trees are not re-united, and this he collected out of *Herlackendens Case* 4 *Coke* and 12. *Eliz. Bendlowes*, a man made a Lease for anothers life, and bargain and sold the Trees to him for whose life Lessee dyes, he for whose life becometh occupant of the Land, he shall have severall Estates, one Estate in the Land, and another Estate in the Trees, and so in *Ives Case*, 5 *Coke* 11. a. Lessee takes a Lease first of Land except the woods, and after takes a Lease of the Woods and Trees, and they remaine distinct and though that after there are generall

words in the Lease, that is, of all Meadows, Pastures, Profits, Commodities, &c. That is not materiall, for these shall be referred to all such things which belong to the Land, and so be concluded this point, that the *Trees* remain severall from the Land, and do not passe to *Hoskins* by the Demise of the Copy-hold only, and so he cannot take advantage of the forfeiture, otherwise he did not doubt but that the particular Sum might take advantage of the forfeiture.

Secondly, for the customes, he conceived that the first, that is, that the Copy-holder for life might nominate his Successor, and is good, and so for the second, that such Copy-holder may cut and sell all the Trees growing upon his Copy-hold, and he conceived that the validity of the custome, ought to be adjudged by the Judges, and the Truth of that by the Jury, and when it is found true by a Jury, and that it hath such antiquity that exceeds the memory of man, then this obtaines such privilege as the Prerogative of a Prince, and is part of Law, and stands with it, and this is reasonable custome, and so it hath been adjudged in the Kings Bench, the reason is, inasmuch that the custome is the life of the Copy-hold, upon which that depends, and the party is but a *Conduit* to nominate the Tenant, and when he is nominated and admitted then he takes by the Lord, and that stands with the rules and reasons of the Common Law, that is, that a man devises that a married wife shall sell his Land, and she may sell notwithstanding the Coverture, for she upon the matter nominates the party, and he takes by the Devise, and by this reason, *she may sell to her Husband as it is agreed by the 8 of Assises*. And also by devise that Executor shall sell, Executor of Executor may sell, notwithstanding that he is not in *Ess* at the time of the Devise, and so a Lease for life to one, Remainder to him that *J. S.* shall nominate is good after nomination, and then he takes by the first Livery, as it is agreed in 10 H. 7. and *J. S.* Only hath the nomination, and nothing passes to him, and with this also agrees 43 Ed. 3. 19 H. 7. So if a man makes a Feoffment to the use of himself for life, with diverse Remainders over, and power to himself to make Leases for three lives, this is good, as it is agreed in *Mildmayes Case* and *Whitlocks Case*, 8 Cok, and yet the Estate doth not passe from him but out of all the Estates, and he upon the matter hath only the nomination of the *Lessee*, and of the live, for all the estates apply their forces to make that good, and the 2 El. Dyer 192. 23. Custome that the Wife of the Copy-holder for life shall have her Widdows Estate, is allowed to be a good custome, and there an Estate for life upon the matter is raised out of the estate for life, and annexed to it, and this is by the Custome, and the reason he conceived to be for that that Women should be encouraged

to marry with their Tenants, and by that the marriage with the Tenant, and the custome in this Case both bind the Lord, and so 4 Coke, there are divers customes by which the Lord is bound, and the 8 Coke Swaines Case, where the Copy-holder by custome hath the Trees, in Case where the Lord himself hath them not, so if the Lord sell the Waste, yet the Copy-holder shall not loose his Common in that, notwithstanding that the Estate of the Copy-holder be granted after the Waste is severed from the Mannor, and it is agreed in Waggoners Case 8 Coke, that custome is more available then the Common Law: And for that this case hath been adjudged in this point between Crab and Varney by three or four Judges, he would not further question it. And for the second custome, he agreed that one bare Tenant for life, could not meddle with the Sale or falling of the Trees, but here is a Copy-holder for life which hath Authority given by the Lord, and the Custome to dispose the Trees; and he saith that Bratton and the old Laws of England calls Copy-holders Falkland, and saith they cannot be moved, but in the hands of the Lord they ought to surrender, and agreed that this is within the Rules of the Common Law, for *Consuetudo privatis communium legem* and the Law doth not give reason of that, for this is as a ground, and need not to be proved, for the reason of every custome cannot be shewed, as it was layd in Knightly and Spencers Case, and he sayd, that Mannors are divided into three sorts of Tenures.

Falkland,  
what is so called.

The first holds by Knights Service, and this is for the defence of the Lord, and they have a great number of Acres of Land, and pay less Services.

The second holds by Socage, and this is for to plow and manure the Demesnes of the Lord, and they shall pay no Rent nor do other services, and this was at the first to draw such Tenants to inhabit there, and for that they have Authority to dispose and sell the Trees growing upon their Tenements.

The third, holds by base Tenure, and these were at the Will of the Lord, and these were to do Services, and then these in many Cases have liberty for their Wives in some cases to dispose that for another life, and to dispose the Trees, and so it is in Ireland at this day, where some give more and greater priviledge then others, to induce Tenants to inhabit and manure their Land, for there every day is a complaint made to the Councell for inticing the Tenants of the Lord, and 14 Ed. 3. Bar 277. The Tenant prescribes to have the Windfalls, and if the Lord cut the Trees, that he may have the Lops, and 11 H. 6. 2. The Keeper of the Wood prescribes to have Fee, and 46 Ed. 3. is prescription to stint the Lord in his own Soyl, and all these are for the Incouragement of Tenants to inhabit upon the Land, and time of Ed. 1. Prescription 75. A stranger prescribed to have all the



profit of the Land of another, for a great part of the year, and to exclude the giver of the Soyl, & 69a. It was adjudged in the Kings Bench between *Henrick and Pargiter*, that the Lord may be stinted for Common in his own Laud, and in the Book of Entries 563. It appears that by Custom Copy-hold granted, *Sibi & suis*, was a good Fe-simple, and the reason of all this is shewed in the 4. Coke, amongst his Copy-hold Cases, where it is agreed that the Life of a Copy-hold Estate is the custome, and then if the Custome gives life to the Estate, this gives life also to all the Priviledges which are incident to the Estate, and the Lord is but the means to convey the Estate from one to another, and as in 38 Ed. 3. A man hath a House as Heir to his Mother, and after a stranger grants *Estovers* to him and his Heirs to be burnt in the same House, these Estovers shall go to the Heirs of the Mother, insomuch that they are incident to the House, so of Priviledg incident to a Copy-hold Estate by the Custome, and at the Common Law, if Tenant for life hath cut the Trees, he hath not forfeited his Estate, for he was trusted with the Land, and was not punishable till the Statute of Gloucester, and at this day if there be a melne Remainder for life which remains in Contingency, and that shall prevent that the Tenant shall be punished for this waste, and to make innovation of this custome, will be dangerous, and for that he concluded that the Plaintiff shall be barred.

Warburton.

Warburton Justice agreed: And the first Custome, that is, for the nomination of the Successor, he conceived that it is good, and that it is good by the Common Law, and good by Custome by the Common Law, as a Lease for life, remainder to him which the Tenant for life shall name: So by Custome as the Custome, that if a Copy-holder will sell his Copy-hold Estate, that he which is next of blood to him shall have the refusall, and if none of his blood, then he which Inhabits in the neereff part of the part of the ground shall have it before a stranger, giving for that as much as a stranger would, and the Lord shall have him for his Tenant, whether he will or no, for it shall be intended, that so it was agreed at the first, and it is reasonable, and if it had not been ruled and adjudged before, yet he conceived it might now be a rule and adjudged, insomuch that it is so reasonable and good, and for the second custome, that is for the custome of cutting of Trees, by such Copy-holder which hath such priviledge, he conceived also that it was good: But he agreed that a bare Tenant for life cannot be warranted by custome to do such an Act, as it was here adjudged between *Powell and Peacock*: But here he had a greater Estate then for life, for he hath power to make another Estate for life, and shall have as great priviledge as Tenant after possibility, &c. which is in respect of Inheritance which once was in him, and he may do it for

for the possibility which he hath to give to another Estate; as it is agreed in 2. Ed. 4. that a Lease for a hundred yeares is Mortmain, in respect of the continuance of it, so here, for the Estate may continue by such power of nomination for many lives in perpetuity, and that as when at the Common Law they have in reputation and opinion of Law a greater Estate, may cut and sell Trees, so here inasmuch that the Estate comes so neere to Inheritance, he conceived that he might cut the Trees by the custome, and that the Custome is good; and so he concluded, that Judgement should be given, that the Plaintiff should be barred in respect of Customes; and then to the third, that is, when a man lets Land, and by the same Deed, grants the Trees to be cut at the will and pleasure of the grantee, there the Lessor hath distinct Interest: But if the Lessor by one selfe same clause had demised the Land and the Trees, there the Intendment is: But notwithstanding that there are severall clauses, and that he hath distinct Interests, yet he conceiveth that the Trees remaine parcell of the Inheritance and free-hold till they are cut and are severed only in Interest, that is, that may be felled and devided by the Axe, for Tyches shall not be paid for them if they exceed the growth of twenty yeares, nor it shall not be Felony for to cut those and burn them: And it is not like to an Advowson, for that may be severed, and for that he conceived that if the Custome had not warranted the Cutting and Selling, that the Copy-holder had forfeited his Estate, and that the Lord might very well have taken advantage of it, and 29. ass. 29. A man sells Trees to be cut at Michaelmasse ensuing, and before Michaelmasse Haukes breed in them, the seller shall have them, by which it appeares that the property is not altered: So that though they are not parcell of the Mannor, yet they are parcell of the Free-hold, inasmuch that they are not severed in Facts: And he agreed that Lessee for yeares of a Mannor shall take advantage of Forfeiture, and need not any presentment by the Homage, and Littleton fol. 15. saith, that the Lord may enter as in a thing Forfeited unto him; and so for attainder of Felony: And if a Copy-holder makes a Lease for yeares, by which he forfeits his Copy-hold Estate: And after the Lord grants the Mannor for yeares, the Lessee of the Mannor shall take advantage of this Forfeiture made before he had any Estate in the Mannor without any presentment by the Homage: But here in this case the Custome warrants the cutting of the Trees by the Copy-holder, and for that he concluded all the matter as above, that the Plaintiff should take nothing by his Writ.

Coke cheife Justice agreed, and he said that Forrester and Littleton

Coke.

And all others agree, that the Common Law consists of three parts, *First* Common Law, *Secondly* Statute Law, which corrects, abridges, and enlarges the Common Law: *The third* Customs which takes away the Common Law: But the Common Law Corrects, Allows, and Disallows, both *Blasphemous* and *Customs*, for if there be repugnancy in Statute, or unreasonableness in Customs, the Common Law Disallows and rejects it, as it appears by Doctor *Bradham's* Case, and 8 *Coke*, 17. *H. 6. Tenants*: And he conceived that there are five differences between Prescription and a Custom: And all those as pertinent to this cause.

*First* in the beginning, *Prescription* is *Dispositive*, for nothing may be good by prescription, but that which may have beginning by grant, and also prescription is incident to the Person, and Custom to some place, and holds place in many Cases, which cannot be by grant, as in 17. *H. 4. Lands* may be devised by Custom, and so descent to all the Sons, as in *Gavelkind*; and to the youngest Son in *Bartholomew English*, and others like, which cannot have their beginning by Grant, but prescription and Customs are Brothers, and ought to have the same age, and reason ought to be the Father, and Congruence the Mother, and also the Nurse, and come out of memory to Fortify them both.

*Secondly* they vary in quality, for prescription is for one man only, and Custom is for many, still but one be not dead.

*Thirdly* they vary in degree and latitude, for prescription extends to Fee-simple only, but Custom extends to all Interests and Estates, and forever, as appears by pleading, for Tenant in tail, for life or years cannot prescribe what Estate, nor against the Lord in his Demaines, but they ought to alledge the Custom, and against a stranger they ought to prescribe in the name of the Lord, and for that prescription a Copyholder of Inheritance may sell the Trees, is not good; but such Custom is good, and 3. *Ed. 3. 24.* And the old Reports 196. One Tenant being a Freeholder prescribes to have Windfalls, and all Trees which are withered in the Top and if the Lord makes them in Cole, to have so much in money: And so if they sell, and this is good, and this was not good, inasmuch that it is alledged in the person as prescription, but if it had been alledged as Custom, and to be burnt in his house, then it shall be good as appendant, and 14. *Ed. 3. 227.* *Bartholomew* (sith to be alledged that prescription to have Turbary to be burnt in his house is good, but not to sell, and 11. *H. 6. 17.* accordingly, by which it appears that this may be very well by Custom, and cannot be by prescription.

Thirdly



Thirdly he conceived that where a man may create an Estate without nomination, there he may create that by nomination. And also that which may be done by the Common Law, may be done by Custome, and that an Estate may be created by such nomination, it appears by the case, where a Remainder is Limited to him, which the first Tenant for life shall nominate, and it is very good, and to prove that the Custome is good, he remembered the custome of *Millam in Norfolk*, where he was borne, that is, that if any Copy-holder will sell his Land and agree of the price, that at the next Court when a Surrender is to be made, the next of his blood, and if he will not any other of his blood may have the Land, and so every one shall be preferred according to the nearness of his blood, and with this also agreed the Leviticall Law, as it appears, *Leuiticus* 25. chap. ver. 15. which appoints this to be at the yeare of Jubile, and the Common Law within one yeare after the Alienation, and upon this he inferred, that if Custome may appoint Heire in the life of the party, then a Father, he may appoint Successor after his death, and he conceived, that at the beginning, the Copy-holders might have had absolute Fee-simple of the Lord, and they rather made choice to have such Estate, insomuch that they did not know, if their Children would be cowardly or not, and for that content themselves with the nomination of a Successor only, and so is the Custome at *Hamm* also in *Middlesex*, if any Copy-holder will sell, the next Chivener, which is he that dwelleth next unto him, shall have the rehusall, giving so much as another will, and he which inhabits one the East part first, and the South and the West, and last the North shall be preferred, is the only way in his course, and there the Successor is nominated by the heavens, and by the quarters of the Earth, and so is the custome in *Gloucester*. And if any Husband hath an Estate for twelve yeares, his Wife shall have it for twelve yeares also, and so ad Infinitum, and this makes nomination, and so of Free-hold, and so if it be good without nomination, it shall be good by nomination. And if the Estate determined by the Death of the Tenant, without nomination when the Lord revives the Copy-hold Estates, the priviledge also shall be revived. But he conceived that the Tenant cannot nominate part to one and part to another, nor that divided in fractions. And he saith that this point hath been adjudged in the Kings Bench by foure Judges against *Pophams*. *Jacob between Bull and Tabb*. And so be concluded this point, and to the second custome he said, he would speake to that *Transitive*, but not *Descriptive*, and that it hath been adjudged 45. Eliz. between *Powell and Peacock* that bare Copy holder for life, could not prescribe to cut and sell the Trees, otherwise of Tenant in Fee-simple, for he hath them cherished and fostered. And it is against

against common reason, incongruent and against the Common Law, that a Copy-holder for life may cut and sell the Trees, and custome ought to have reason and congruence, for 10. Ed. 3. 5. *Leets cannot be belonging to a Church, insomuch that it is Incongruent*, and so in *Whiter Case* 2. *Coke Tythes* cannot be appurtenant to a Mannor, insomuch that it is incongruent; and a spirituall thing shall not be pertinent to a temporall, and so *Converso*: And so in the 5. *Affis*. 9. and *Hill and Granges Case*, *Com*. Turbary cannot be appurtenant to Land, insomuch that it is incongruent, but it ought to be to a house; so in time of Ed. 2. Tenant of the Mannor prescribes to have free Bull and Bare, and it is not good for the reason aforesaid, otherwise it is of the Lord of a Mannor, and 9 H. 5. 45. custome in *Leets* to present common, and adjudged that it is not good, insomuch that it wants congruity, for it is not proper to the Court, and upon this he concluded that bare Tenant for life cannot prescribe to cut Trees, for it is not congruent that such an Estate shall have such a priviledge, and this for three reasons.

First insomuch that Trees growing are parcell of the Inheritance.

Secondly in respect of the perdurableness of them, for it shall be intended that they will indure for ever, and so will not his Estate, for this is as a shadow as *Job* said, and 'tis absurd that shadow should cut downe the Tree: And also it is for necessity of habitation and Plow and Husbandry: And it is for the Common Wealth, that Copy-holder of Inheritance might cut them by such custome, for otherwise he would not be incouraged, to plant and preserve them: And notwithstanding that in this Case the custome be general, that the Copy-holder may cut down all, yet that shall have a reasonable construction, and that this notwithstanding he leave sufficient for House-boot; as if a man grants Common without number, yet the Grantor shall not be excluded, but shall have his Common there, for excess shall not be allowed.

As if a man which distraines another for Rent he shall not take excessive distress, the *Lessee for life excessive Tallage of villaines*, nor upon excessive Fines of Copy-holders, and so it was adjudged in *Heyden and Sir John Lenthorps Case*, that the Lord shall not take all; but leave sufficient for reparations, and so was the opinion of *Wray cheife Justice* in the 33 of *Elix.*, in evidence to a Jury, but here he is in nature of Tenant in Fee-simple, and it shall be intended that he hath cherished the Timber, and every Copy-holders Estate granted is as a new Grant, and hath affinity with Tenant in Fee-simple, and he agreed that if Lessee for life, the Remainder for years, Remainder for life be, and the first Lessee for life makes a forfeiture, he in Remainder for years shall take advantage of that, and that it hath

hath been adjudged, that the Lord of the Mannor shall take advantage of forfeiture made by the Copy-holder, *without presentment made by the Homage*, and in one *Bacon and Flotfims Case*, and so *Lessee for yeares of a Mannor shall take advantage of Forfeiture, notwithstanding the Imbecillity of his Estate*, but the principall matter upon which he relyed was, that the *Trees were severed from the Freehold*, and if the *Lessee dy*, his Executors shall have them, inasomuch that they are meer Chattells, and this.

First in respect of the Words of the Lease, that is, demise, and to farm let the Mannor, but bargain, sell, give, and grant the Timber Trees to be felled and carried away at his Will: As if a man makes a *Lease* for years, except the Wood, and after grants the Trees, the Lease determines, the Lessor shall not have the Trees again.

Secondly, They are in two divided Sentences, and also in respect of divided properties, *for the Executor of the Lessee shall have them; and Quando duo Jura, concurrunt in una persona, equum est ac si esset in diversis*; also past at severall times, for the Trees pass by the delivery of the Deed, and the Land doth not pass till Livery and Seisin be made. Also the intent of the parties is not that they shall pass together, for if the intent were otherwise the Law would not divide them, as it was adjudged *Hillary 25. Eliz. in the Lord Cromwells case*, where Tenant in Tayl was of a Mannor, with the Reversion to his right Heirs, and he by his Deed gives and grants the Mannor, and the Reversion of that, and includes Letter of Attorney within the Deed to make Livery, but Livery was not made, and yet the Reversion doth not pass, for his intent appeares that it should pass by Livery and Seisin, and not by grant; and also in *Andrewes case*, the Advowson appendant to a Mannor shall not pass without inrolment of Bargaine and Sale, yet there were words there, that that might passe by Grant, for this was against their intent; otherwise if a man makes a Lease for life or years of a Mannor, and grants the Inheritance of the Advowson by the same Deed, and so of the case of *23 Eliz. Dyer 374*. Lessor deviseth, Grants, and to farm lets the Mannor and the Trees, and they passe joyntly; and the Reason is inasomuch that it is but a Joynt sentence, and not severall as it is here, also he intended, that the life of the Lessee for life is not averred, and for that he shall be intended to be dead, and for that it is a severall grant of the Trees of the Freehold, for the Interest of them is settled in his Executors, for if he had made Sale of them before that the Copy-holder had cut them down, then that had not been forfeiture, see *5. H. 7. 15 Ed. 4. 14 Eliz. Dyer*. And then the Case is this, Tenant for anothers life of a Mannor, makes a Lease for yeares of the Freehold, of which an Estranger hath a Copy-hold Estate for life in *Esse*, Lessee dies, and



and he conceived that the Copy-holder shall not be an occupant, for it ought to be *Vacua Possessio*, and this was the reason of the judgment in *Adison's Case* in 18 Eliz. Where a man makes a long Lease for years, and after intending to avoyd this Lease, makes a Lease to another old man for anothers life, so the intent that the Lessee for yeares should be occupant, when the old Lessee died, and so drowned his Term, and after the Lessee died, and resolved that the Lessee for years shall not be an occupant, inso much that there was not *Vacua Possessio*, and for this it seems to him that if Lessee for anothers life, makes a Lease for years and dyes, that the Lessee for years shall not be an occupant, notwithstanding that he made speciall claim, and that for the reason aforesaid, but he agreed that a Lessee for anothers life makes a Lease at will and dies, where the Lessee at Will shall be an Occupant, inso much that his Estate is determined, and yet there is not *Vacua Possessio*, according to 38 H. 6. 27. But he did not say there should be an occupant in these cases, but cyted *Bracton fol. 8.* that if the Sea serve an Island in the middle of that, the King shall have it, and not *Occupantia conceditur*, and so he concluded that the Plaintiff shall be barred, and that Judgment shall be entred for the Defendant, which was done accordingly, and it was afterwards agreed, upon motion in this case, whether it would not make difference if the Trees were cut by the Copy-holder before that he hath made his nomination or not, notwithstanding it was objected, that when he hath made his nomination, then he was only bare Tenant for life, and the Priviledge executed, and he in Remainder was also Tenant for life only, for he cannot nominate till he comes to be Tenant in possession, but this notwithstanding, inso much that they had power to make nomination, that is the first Tenant again, if the second died in his life time, and the second if the first died in his life time, and so the Priviledge continues, all the Justices continued of their opinions, and according to that Judgment was entred for the Defendant, and that the Plaintiff should be barred, and should take nothing by his Writ.

*Quod non occupantur conceditur.*

Trinity 8. Jacobi 1610. in the Kings Bench.

The Lord Rich against Franke.

Debt against  
Administrator  
for Rent in the  
Debet and  
Detinet.

THE Lord Rich brought an action of Debt against *Franke's* Administrator of one *Franke*, and this was for a rent reserved upon a Lease for yeares, made to the Intestate, and the Action was brought in the *Debet and Detinet*, for rent due in the time of the Administrator, and verdict for the Plaintiff, and after moved in Arrest

Acquiescence of Judgment by the Councils of the Defendants, that this Action ought to be brought in the *Debts only*, and not in the *Debts and Detinets*; and Chibborne of *Lincolnes Inne* conceived that the Action was well brought in the *Debts and Detinets*, and to that he said that *Hargreaves case* 5. *Coke* is so reported to be adjudged, but he saith that he hath heard the Councils of the other part insisted upon that, that this Judgment was reversed, and for that he would under favour of the Court speake to that. And hee conceived that the Action so brought, is well brought; for three Reasons.

Chibborne.

The first shall be drawn from the nature of the Duty, and to that the Case rests upon this doubt; that is, if the Administrator is now charged for his Rent, as upon his own duty, or as Administrator, and it seems to him not as Administrator, but as upon his own duty; for he saith, that it is not Debt nor duty till the day of payment, as *Littlerian* takes the diversity in his Chapter of Release, between Debt upon an obligation and a Rent, and the day not being incurred in time of the Incestate, this cannot be his duty; therefore that ought to be duty in the Administrator, and to the cases of 19 H. 8. 8. Where the Executor of a Lessee for twenty years, which had made a Lease for ten years rendering Rent, brought action of Debt against the Lessee for ten years, for rent incurred in the time of the Executor, and this is in the *Detinets only*, and the Case of 20 H. 6. 4. Where an Executor brings an action of Debt upon Arrerages of Account of an Assignment of Auditors by themselves in the *Detinets only*, and he said that in these Actions, the Executors were Plaintiffs, and in all actions brought by Executors where they are Plaintiffs, and the thing recovered shall be Asset, the Action shall be brought in the *Detinets*, but in our case they are Defendants, and so the diversity, and to the Objection, that may be made to this Contract out of which this duty grows and arises, it was made by the Incestate, and not by the Administrator himself, and so this is a duty upon the first Privy of the contract, he answered that there is great difference, when a thing comes due by the Contract of the Testator alone, and ought to be payed in his time, in which the Executors are to be charged meerly as Executors, there the Writ shall be in the *Detinets*. But when the thing grows due in part upon the contract of the Incestate, and part by the Occupation of the Administrator, as in our case, there it shall be brought in the *Debts and Detinets*. He cited a Case which was adjudged 26 E. 1. in the *Commons* brought between *Scraps* & the *Duchy of Gresham*, where it was resolved that the Lady *Gresham*, was made chargeable to the Debts of her Husband by Act of Parliament, and Action of Debt brought against her in the *Debts and Detinets*, and debated if this were well brought, and after

Detinets only.

Argument, adjudged that it was well brought in the *Debet and Detinet*, for though she was not chargeable for the Debts of her Husband, upon his own Contract, yet where an Act of Parliament hath made her chargeable, and a Debtor, and for that reason the Action shall be brought against her in the *Debet and Detinet*, and to the principal case he cited the Case of 11 H. 6. 7. where it is said by *Babington & Newton*, that if a man be Lessee for years, and is in arrears for his Rent, and makes his Executors and dyes, and the Executors enter into the Land and occupy, in this case for the Arrearages due in time of the Testator, Action shall be brought against them in the *Detinet*, but for Rent due in their own occupation, the action shall be brought in the *Debet and Detinet*, for that it rises upon their own occupation, and with this agrees 20 H. 6. 4. And he said that he would demand this case of the Councill of the other part, that is, a man hath a Lease for yeares as an Administrator, and Rent incurre in his time, and he makke his Executors and dyes, and Administration of the Goods of the Intestate is committed over to another, against whom shall the Action be brought for the Rent, that is, against the Executors of the first Administrator, or against the second Administrator: and it seems cleerly to him, against the Executors of the first Administrator, for their Testator had taken the profits, which case proves that they shall not be charged meerly as Executors or Administrators, but as takers of the profits, &c. And Occupiers of the land.

2.

Heire chargeable  
in *Debet and  
Detinet*.

And this was his second reason of the nature of Profits, inasmuch that they were raised by the personall labour of the Executor or Administrator, and are their Goods, as he said, and they have them not meerly as Executors or Administrators, and for that the Action is well brought as it is, and he said, that the Heir for Debt of the Father shall be charged in the *Debet and Detinet*, and yet this was the contract of his Father, but he is charged in respect that he hath the land, and the occupation and profits of that, so here inasmuch that the Executors have the profit of the Tearn, by the same reason they shall be charged in the *Debet and Detinet*, and he resembled the case to a case put in *Fitz. Na. Bre. In his Writ of Debt*, where a woman sole hath a lease for years, and takes a Husband, and the Rent incurre, and the wife dies, the Husband shall be charged in the *Debet and Detinet* for this rent, and the reason is, because he hath taken the profits, so here the Administrator hath taken the profits, and is not answerable for the Profits, unless they amount to more then the rent is: And by the same reason the action is well brought against him as it is.

3.

The third and last reason, was for the Inconveniency, and to that he said, if this Action be brought in the *Debet and Detinet*, there



there is no inconvenience; but if it should be brought in the *Detinet* only, then should the Administrator be charged but of the Goods of the dead, where if he be not charged of his own proper Goods, peradventure he shall not be so carefull to pay his rent; but would stop the *Lessor* in his Action, which should be trouble and vexation, and so by this reason also he concluded the Action well brought in the *Debet and Detinet*; and this was gainsayd by *Towse, George Crook, and Harris* of the other part, and it seems to them that it should be in the *Detinet* only, inasmuch that the cause of this Action growes of the contract of the Testator, and the Term is Assets in their hands, and the Administrator hath the Term as Administrator, and by the same reason the Occupation shall be as *Administration*; and by consequence he shall be charged as Administrator, and not otherwise, and then the Action shall be brought against him in the *Detinet* only, and that he shall be charged as Administrator they cited the Book of 14 H. 4. 28. Where it is sayd, if a man hath a lease for years and makes his Executors, and the rent incurs in their time, and action of Debt is brought against them, and they make default, he which first shall come by distress shall answer according to the Statute of 9. Ed. 3. chapter 5. which Book proves directly as they say, that they are charged as Executors, and not otherwise, and then it follows that the Action should be in the *Detinet*, so it seems to them that in all Actions, where they are named Executors or Administrators, that the Action shall be brought against them in the *Detinet* only; but in this action they ought to be named Executors or Administrators, for he doth declare of a Lease made to the Intestate, and for that it seems it shall be brought in the *Detinet* only, and this was the reason of *Zecharias* Justice, which was of their opinion only against the other Justices, and so far which was sayd that an Action shall be brought against the Heir in the *Debet and Detinet* for the Debt of his Ancestor they answered, that this is now become the proper Debt of the Heir, but it is not so in the case of an Executor or Administrator.

And it seems to *Towse*, that if an Administrator hath a Lease for twenty years, and makes a Lease for ten years rendering Rent, and brings an Action for this Rent, that the Action shall be brought in the *Detinet* only, for that this is a new contract made by the Administrator, and he hath gained new Reversion, because it was derived out of the lease for twenty years, and so this shall be of the same nature; and the Rent shall be Assets in his hands, and in proof of this he cited the book in 17. Ed. 3. 66. Where an Executor sold the Goods of the Testator, and the Vendee made an Obligation to them for the money, and the Executors brought an Action of Debt upon the Obligation, and this was brought in the

*Towse, Crook, and Harris.*

*Detinet*



seemes if he hath Affets sufficient to pay the Rent he cannot waive it. And so the case is. *H. 4. 18.* That hath been cited that doth speake nothing, how the Action should be brought. And the Justices have seen the record of *Hargrave's* case, and the Reversall of that. And they find the same error which was in *Hargrave's* case, is in this case, and for that bring your Writ of Error in the Exchequer chamber if you will, for we so adjudge. And then it was moved that the Lord *Rich* was Tenant in Tayle, of part of the reversion, and Tenant in Fee-simple of the other part, and so it seemes that he ought to have two Actions, because he hath as two reversions. But it was resolved by all the Court, that if a man have a reversion of part in Fee-simple, and of the other part in tayle, and makes a Lease for yeares rendering a Rent, he shall have but one Action, both being in the hands of one. But otherwise it had been if the reversion had been in severall hands they should not joyne in Debt, and for that *Finner* put this case: two Coparceners are of a reversion and they make partition, now the Rent is apportioned, and they shall sever in Debt. But if one dies without Issue, and the part descends to the other Parcener, now he shall have but one Action of Debt againe, and so it is if a man makes a Lease of two Acres rendering Rent, and after grants the reversion of one Acre to *J. S.* and of the other Acre to *J. N.* now they shall sever in Debt for this Rent, But if *J. S.* and *J. N.* Grant their reversions againe to the first Lessor, he shall have but one Action of Debt, and to the exception disallowed by all the Court, and the Judgement given for the Plaintiff, according to the Verdict.

*Tates and Rolles.*

The case was this, *J. S.* covenants by Indenture with *J. N. L.D.* and *A. B.* to enter Bond to pay ten pound to *J. N.* and *J. N.* dies, and his Administrator brings a Writ of covenant, and the question was inso much that this ten pound was to be paid to *J. N.* if his Administrator shall have Action of Covenant, or if the Action shall survive to the other two, and it was moved by *Stephens* that the Action shall be well brought by the Administrator, for this shall be taken as a severall covenant, and this now is in nature of a Debt, and enures only to him which shall have it, also the payment of the money which is the effect of the covenant shall be to him only. Ever the Damages for the not performing of it shall goe to him also, and by consequence to his Administrator. But it was adjudged inso much that this was a joynt covenant, that this shall survive to the others, and nor well brought by the Administrator. So also resolved that inso much that the words are, that he would enter

Joynt Covenant shall survive.



enter Bond, and doth not say to whom; that this shall be intended to the Covenanters, and though what the *Solvendum* is but to one of them, yet that is very good, as an Obligation made to three *Solvendum* to one of them is good, by *Fenner* and by *Williams*, Obligation to two, *Solvendum* ten pound to one, and ten pound to another, both ought to joyne in Debt upon this Obligation, and Judgement for the Defendant.

*Samner and Force.*

Copy-holder  
shall hold  
charge.

**T**He Case was this, The Lord of a Copy-hold Mannor where Copy holders are for life, grants Rent-charge out of all the Mannor; one Copy-hold Escheats, the Lord grants that againe by Copy; the question was, If the Grantee shall hold it charged or not; and by the whole Court but *Fenner*, he shall not hold it charged, because he comes in above the Grant; that is, By the custome; the same Law of Statutes, Recognizances, or Dowers; but the 10. of *Eliz. Dyer* 270. by the whole Court, that he shall hold it charged; but this hath been denied for Law in a Case in the Common Bench, between *Swaine* and *Becket*, which see *Trinity* 5. *Jacobi*: But to *Coke* Justice it seemed, that if a Copy-holder be of twenty Acres, and the Lord grants Rent out of those twenty Acres, in the tenure and occupation of the sayd Copy-holder (and name him) There if this Copy-hold Escheat, and be granted againe, the Copy-holder shall hold it charged, for this is now charged by expresse words.

*Trinity* 8. *Jacobi*, 1610. In the Kings Bench.

*Goodyer and Ince.*

Error.

*Elegit.*

**G**oodyer was Plaintiff in a Writ of Error against *Ince*, and the Case was this, *Ince* brought an Action of Debt upon an Obligation in the Common Bench against *Goodyer*, and had Judgement to recover, and by his execution prayed an *Elegit* to the Sheriff of *London*, and another to the Sheriff of *Lancaster*, and his request was granted, and entred upon the Roll, after which went out an *Elegit* to the Sheriff of *Lancaster* upon a *Testatum*, supposing that an *Elegit* issued out to the Sheriff of *London*, which returned *Nulla bona*, and *Quod Testatum sit, &c.* That the Defendant hath, &c. in your County, &c. upon which *Elegit* upon this *Testatum*, the Sheriff of *Lancaster* extended a forme of the Defendants in a grosse sum of a hundred pounds, and delivered this to the party himselfe, which sold that to another; and now the Defendants brought a Writ of Error, and assigned for Error, that this *Elegit* issued upon a *Testa-*

*stum,*

where no Writ of *Elegit* was directed to the Sheriff of London, and so this Writ issued upon a false supposal, and upon that two points were moved in the Case:

Testatum  
where no Writ  
had issued.

First, As this Case is, if this were Error in the Execution or not.

Secondly, Admit that it were Error, if the Plaintiff shall be restored to the tearme againe, or if to the value in Money; and it was moved by *Davenport of Grays Inns*, that this was no Error; and to that he took this difference, That true it is, when a man brings an Action of Debt in London and hath Judgment, that without request of the Plaintiff he is to have his *Elegit* to the Sheriffs of London, where originally the Action was brought; and in such Case he cannot have *Elegit* to the Sheriff of another County, without surmise made upon the returne of the first *Elegit*, and the surmise ought to be true; or otherwise it is Error; but where upon the request the *Elegit* is granted to both Counties at the first, and so entred upon the Roll: It seems to him that insomuch that he may have both together, that if the surmise be false, that this is but a fault of the Clarke, which shall be amended, and shall be no Error; and to that he cyted the Case of 44 *Edw. 3. 10.* Where an *Elegit* issued upon a *Recognizance* of a hundred Markes, and the Writ of *Extent* was a hundred pounds, and the Sheriff extended accordingly of the Land of the Defendant, and he came and shewed this to the Court, and prayed that the Writ should abate, and a new Writ to the Sheriff, that he might have restitution of his Tearme, and *Thorp* said this is but a misprison of the Clark, and the Roll is good, and he shall have the Land; but till the hundred markes are Levied, and after this you shall have restitution of the Land, which case proves as he conceives, that if the Roll warrant a writ in one manner, and the Clark makes it in another manner, that this shall not be Error, and so in this case the Roll warrants an *Elegit* originally to the Sheriff of *Lancaster*, and though that this is made upon a *Testatum*, this shall not be Error, because warranted by the Roll: And to the second point he would not speake, for if that were no Error, the second point doth not come in question.

Hillary 7. Jacobi 1607. in the Kings Bench.

Marfaw against Hunter.

IN Trespasse the case was this, Copy-holder of a Mannor, within which Mannor, the custome was that the Copy-holders should have Common in the wast of the Lord: The Lord by Deed confimes to a Copy-holder to have to him and his Heires with the apputenances, and the point was insomuch that his Copy-hold

Confirmation to  
a Copy-holder,  
destroys Com-  
mon.

must be T  
of an order  
220

was now destroyed, whether he shall have his Common or not. And *Daryes of Lincolns Inne*, argued the Common is extinct, and his reason was, that this Common was in respect of his Tenure and the Tenure is destroyed, Ergo the Common; and he cited the case of 5 *Ed. 4. fol. 111.* Where the office of the King of Herralds was granted to *Garter* with the Fees and profits, *ad antiquas*, and also ten pound for the office, and there it is resolved if the office be determined, the Annuity is determined also, and the case in 7 *Ed. 4. 22. b.* Where an Annuity was granted to *John Clark* of the Crown, and for Terme of life, and after he was discharged of the office, and the opinion of the Justices then was, that the annuity was determined, and in 19 *Ed. 4. Assise. 83. 12. Assise. 22.* A man gives Land to his Daughter and *A. S.* within the years of marrying, in frank-marriage, the Husband sues Divorce, the marriage being dissolved, the Wife from whom the Land first moved shall have the Land again, so in the principall case, inso much that this common was in respect of Tenure, the Tenure being destroyed, the common is gone, and this was all his argument, and he prayed Judgement for the Plaintiff, and another day *Brantingham* of *Grayes Inn* seemed that the common remains for three reasons.

First of the nature of a prescription, and to that there are three manner of prescriptions.

First personall prescription, and in that Inhabitants may prescribe, as for a way, or matter of case, as it is said in 7 *Ed. 4. 15. Ed. 4. and 18. Ed. 4. and 60. Coke, Gathobbs case.*

Secondly reall prescription, and this is Inherent to the Estate, and this is where a man prescribeth that he and all those whose Estate he hath, &c. Thirdly, locall prescriptions an that is, where a man prescribeth to have a thing appendant or appurtenant to his Mannor, and this is so fixed to the Land, that whether soever the Land goes, the prescription is concomitant unto it, and it seemes to him that this common is annexed to the Land by prescription and so locall, and cannot be separated but alwaies shall go with the Land, into who soever hands that comes, (but *Dixit non Probat*.) And for this he supposed that the custome of Copy-hold is that the Copy-hold shall descend to the youngest Son, if the Copy-holder purchase the Free-hold and the Fee-simple of the Copy-hold, so that this is made Free-hold, this shall descend to the youngest Son; so if a Copy-holder by custome is discharged of payment of Tythes in kind, so the office of the master of the Rolles hath many liberties pertaining to it, and this is granted but *Durante placito*, yet if the King grant that in Fee as he may, yet he shall have all the Fees and Priviledges annexed to that, and so it seemes to him that this common being annexed to the Land, though that the Estate be increas-

ed,



ed, yet the common remaines, his second reason was of the manner of conveyance, and that was by confirmation, and if that conveyance had been by Feoffment, peradventure the common had been gone: But a confirmation enures allwaies upon an Estate precedent, and though that this sometimes enlargeth the Estate, yet it doth not alter the Estate, as to any priviledges annexed to it, his third reason was of the matter of the confirmation, and that is; that he hath confirmed it with the appurtenances, and this seemes to him, admitting that the common had been extinct, yet these words with the appurtenances amount to a new grant of a common, as in the case of *Corody*, in 22, Ed. 4. 17. and 18. If the King grant to one such a Corody as *I. S.* had, he shall have so much bread and beere as *I. S.* had, so here when he grants and confirms that with the appurtenances, this is with all such priviledges as *I. S.* had; so here when he confirms with the appurtenances, this is with all the priviledges that the old Estate had, and so this should be a grant of such common as was annexed to that, and so it seemed to him for these reasons that the common remaines: to which it was said by *Doctores* of the other part, that he agreed at the manners of Prescriptions, but he denied that it was a locall Prescription, that is to Land but only to an Estate, and this proves well the words of the Prescription, for the Copy-holder ought to prescribe, that is, that every customary Tenant within the Mannor, &c. So he hath his common in respect that he is customary Tenant, and this is in respect of the Estate which he hath by the Custome, and not in respect of the Land, and that this shall not enure as a new Grant, he cited a case to be adjudged *Michaelmasse* 43. and 44. *Eliz.* in the Kings Bench, *Ror.* 367. Where in Trespasse, the Defendant justified the fopping of Trees in the wast of the Lord, where the custome was that every Copy-holder might shride the Trees in the wast of the Lord, and that he was a Copy-holder there, and the Lord granted to him the Inheritance of his Copy-hold, with all such Lands, Tenements, and Commons of Estovers pertaining to the Copy-hold, and adjudged that insomuch that the Customary Estate was destroyed, this custome was not now annexed to the Land, but being determined with the Estate cannot be said appertaining to it, and for that the Justification ill; and it seemed to him to be all one with the principall case and it was adjourned, and after in *Michaelmasse* Tearme 8. *Jacobi*, It was adjudged that the Common was extinct and not revived.

Hillary 7. Jacobi 1609. In the Kings Bench

Proctor against Johnson

*Expreſſe Coven-  
nant qualifieſ  
Covenant in  
Law.*

**T**HE Caſe hath depended ſeven yeares in this Court upon a Writ of Error, was this, Two Joynt Tenants for yeares of a Mill, one grants his Eſtate ſeverally to another and dies, the Grantee doth not enter yet: The other reciting the Leaſe to him made and to his companion joyntly, and that his companion died, ſo that all belonged to him as Survivor (as he intended) grants all the Mill to *Johnson*, and all his Eſtate, Right, and Interſt in that: And covenants that the Grantee there ſhall continue diſcharged and acquitted of all Charges and Incumbrances, or other Act or Acts done by him, and after binds himſelfe in a Bond to performe all Grants, Covenants, and Agreements, contained in the Indentures, according to the intent and meaning of the parties, and after the Grantee of his companion entered into the halfe, and the queſtion was, If the Bond were forfeit or not; and it was adjudged in the Common Bench that the Obligation was forfeited: And the matter was argued this Term in this Court by *Yelverton of Grayes Inn*, that the Bond ſhall not be forfeited, for the Bond was with Condition to performe all Grants, &c. According to the true intent and meaning of the parties, and then let us ſee what was the intent of the parties, and ſuerly this appeares by the recitall in the Indenture, and for that he ſaid that all appeares to him, as Survivor (as he conceived) ſo that he was doubtfull of that, and for that his meaning was, that if he had all, then to grant all; and if he had but a moiety, then to grant but the moiety, and this proves well the words ſubſequent, where he ſaith that he granted the Mill (and all his Eſtate, Right and Interſt in that,) ſo that he did not intend to grant more then his Eſtate, and theſe words ſubſequent qualifie the generall words precedent, and ſo it ſeemes to him that the Obligation ſhall not be forfeited.

And Sir Robert Hicſham the *Queens Attorney* to the contrary, and that the Bond was forfeited, for he hath bound himſelf to perform all grants, and he hath not performed his Grant, for he granted all the Mill, and then though but a moiety paſſeth yet he ſhall forfeit his Bond, if the moiety be evicted, and for that if a man which hath nothing in the Mannor of *D.* makes a Leaſe by Deed indented 10 *l.* and binds himſelf to performe all Grants, though that nothing paſſes, yet if he enter and be ejected he ſhall have Debt upon his Obligation, and he cited *one Yelvertons Caſe* to be adjudged, but did not tell when, where a man which hath nothing in the Mannor of

of Dale, covenants with J.S. to stand seiled to the use of him and his Heirs at Michaelmas, and before Michaelmas he purchases the Mannor of Dale, and it was resolved that no use shall be raised at Michaelmas for he had not the Mannor at the time of the Covenant, and also it was resolved that no Action of Covenant lies upon the Covenant, but he sayd that it is a cleer Case, that if he had entred into a Bond to perform all Covenants in the Indenture, that the Bond shall be forfeited, though that he could not have action of Covenant upon the Covenant, and also he sayd, that he well agreed the Case of the Lady Russell, which was adjudged also (*but Nescio quando*) where a man made a Lease for years of the Mannor of Dale except one Acre, the Lessee binds himself to perform all agreements, and after the Lessee enters into the Acre, this shall be no breach of the condition, for this exception is no agreement, for nothing shall be sayd an agreement in an Indenture but that which passeth in Interest, and so he sayd that though that the Lessee cannot have an Action of Covenant in the principall Case, insomuch that this is so speciall, yet the Bond shall be forfeited upon these Words, grants, and agreements, and the Covenant speciall doth not qualify the generall expresse grant; and after four Justices, that is Flemming the cheife Justice, Williams, Telverton, and Crooke, were of opinion, that the Bond is forfeited, and this for the generality of the Grant, & his Intent was cleerly to pass all, but Williams, if he had sayd, *Totum Molendinum suum*, or all his Estate in the Mill, there peradventure it should have been otherwise; and so a difference where he saith he grants the Mill and all his Estate in that, and where he grants all his Estate in the Mill, for in the first case all passeth by the Grant of the Mill, and these words which are after, are but words explanatory, as rooke sayd; and it was adjourned.

And after in Easter Term next ensuing, Hicham the Queens Attorney, came again, and prayed that the Judgment be affirmed, and Telverton of Grayes Inne sayd, that he hath considered of Nokes Case & Coke, and this was all one with this case, for the case was thus, A man lets a House in London by these words, demise, Grant, &c. That the Lessee should enjoy the House during the Term without eviction by the Lessor or any claiming from or under him, and the Lessor was bound to perform all Covenants, Grants, Articles, and Agreements, as our case is, and there by the whole Court, that the sayd expresse Covenant qualifies the generality of the Covenants by the Words Demise and Grant, which is all one with our case, for first be granted, *Totum Molendinum*, and after covenant that he should enjoy, &c. against himself, and all which claime, in, by, from, or under him, and after binds himself to perform all Grants, Covenants, Articles, and Agreements, and so it seems





form Covenants in Law; and he cited charters and Statutes of the Kings of 22 H. 6. and 6 Ed. 2. that if a man makes Lease for years rendering Rent, it is a Covenant in Law, as it is said, 25 ff. 8. Dyce, and a man shall have Debt or Covenant for that, and yet if a man binds himself in a Bond to perform all Covenants where there are other Conditions in the Deed, and after doth not pay the Rent, no action of Debt lies upon this Obligation, nor the nature of the Debt altered by that; and he said that the Monday next, they would pronounce Judgment in the Writ of Error accordingly, if nothing shall be said to the contrary, and nothing was said.

Hillary 7. Jacobi 1609. In the Kings Bench.

## Bartons Case.

THE Case was this, A man was taxed by the Parish for Reparations of the Church, and the Wardens of the Church sued for this Taxation in the Court of Common Pleas, and hanging this Suit, one of the Wardens refused to be Defendant all Actions, Suits, and Demands, and the other sued forward, and upon this the Defendants there procured a Prohibition, upon which matter shewed in the Prohibition was a Demurrer, joined, and Demurrer of Greye Lane was overruled by the Court for a Consultation, and upon all the matter as he said the point was but this, If two Wardens of a Church are, and they sue in the Court Christian for Taxation and one Release, if that shall bar his Companion or not. And it seems to him that this Release shall not be any Barr to his Companion or Impediment to sue, for he said that the Wardens of a Church are not parties interested in Goods of the Church, but are a speciall Corporation to the Benefit of the Church, and for that he cited the Case in 3 Ed. 4. 6. The Wardens of the Church brought Trespass for goods of the Church taken out of their possession, and they counted Ad dampnum Parochie et Rm, and not to their propendage, and the 11 H. 4. 12. 13 H. 7. 27. 43 H. 7. 9. Where it is said expressly, that the Wardens of the Church are a corporation only for the Benefit of the Church, and not for the disadvantage of that, but this Release sounds to disadvantage of the Church, and for that seems to him no Barr, altho this Corporation consists of two persons, and the Release of one is nothing worth, for he was but one Corps, and the moyity of the Corps could not release, and for these reasons he prayed a consultation, and Tilverton to the contrary, and he took a difference, and said, that he agreed, that if the Wardens of the Church have once possession of the Church, there in an Action of Trespass brought for these Goods, one Warden

Prohibition.

den cannot release, but the tax for which they sue is a thing merely in Action of which they have not any possession of that before, and there he cannot sue alone, and for that this release shall barr his Companion. And the Court interrupted him, and sayd, that clearly consultation shall be granted, and *Plenitimus cheife Justice*, we have not need to dispute this release, whether it be good or not, and there is a difference where a suit is commenced before us, as if Wardens of the Church brought Trespasse here for Goods of the Church taken, and one Release, then we might dispute if this release were good or not, but when the matter is original begun before them in the spirituall Court, and there is the proper place to sue for this Tax and not any where else, we have nothing to do with this Release, and for that by the whole Court, a consultation was awarded.

Hillary 7. Jacobi, 1609. In the Kings Bench.

*Style's Case.*

Defendant re-  
enters after  
Possession deli-  
vered by Habe-  
re facias pos-  
sessionem.

**U**Pon a Motion made by *Telverton* on the behalfe of one *Style*, the Case was this, *Style* had a Judgment in *Ejectione firme*, and was put in possession by the Sheriff, by an *Habeas facias possessionem*, and after the Defendant enters againe, within the two weeks after Execution, and the Writ was returned, but not Fyled; and *Telverton* moved the Court for another Writ of execution; and by *Williams* he could not have a new Writ of Execution, but is put to his new Action, and the Fyling of the Writ is not materiall, for it is in the election of the Sheriff, if he will Fyle or returne that or not; but he sayd, if the Execution had not been fully made, as he sayd there was a Case, where the Sheriff made an Execution of a House, and there were some persons which hid themselves in the upper Lotts of the House, and after the Sheriff was gone, they came downe and outed those that the Sheriff had put in possession before; and in this Case a new Writ of Execution was awarded; but there a full Execution was not made, and so the difference: But the cheif Justice sayd, That if the Sheriff put a man in possession, and after the other which was put out enters in forthwith, that in this Case the Court may award an Attachment against him, for contempt against the Court.

Hillary



Hilary 7 Jacobi, 1609. In the Kings Bench.

Gittins against Cowper.

Custom of one Mannor was, That if any Copy-holder within the Mannor committed any Felony, and this be presented by the Homage, that the Lord may take and seise the Land: a Copy-holder committed Felony, and this was presented by the Homage, and after the Copy-holder was indicted, and by Verdict acquit, and the Lord entered, and if his entry were lawfull or not, was the question: The points were two.

Custom among  
Copy-holders.

First, If the Custome were good.

Secondly, Admitting the Custome to be good, if this Verdict and acquittall shall conclude the Lord of his entry.

And after all the Inner Temple argued that the Custome was good, and that the Lord was not concluded by this Verdict: And to the first point he sayd, That it was a good Custome; First inso-much it might have a reasonable beginning, and for that he cyted the Book of 35 H. 6. where it is sayd, that such Customes which might have reasonable beginning should be good, and to that he cyted a Case which was adjudged, at he sayd, in 27 Elix. and was one *Delver* Case, and the Case was this, A *Quo warrant* issued against *Delver*, to know *Quo warrant* he held a Leet, to which he pleaded, that he was seised of such a Messuage, and that he, and all these whole Estate he hath in the said Messuage have used allwaies to have and hold a *Leet* there within the Messuage: If this prescription, that is to have a *Leet* appendant to a single Messuage was good or not, was the question: And it was adjudged inso-much that by reasonable incumbrment it might be that this house was the site of a Mannor, and the Lord granted that, with the Leet, the Prescription adjudged good, and he sayd that many Customes are grounded upon the nature of the place, and for that he sayd that this Mannor was adjoyning to great Woods, and it might be that the Copy-holders committed felonies and outrages, and after fled into the Woods, and there lived, and yet enjoyed the benefit of their Copy-holds, and for that it was reasonable for the Lord to annex such a restraint and condition, that is, if they committed any Felony, this should be a forfeiture of their Copy-hold, and this should be a meaner to bridle them, to commit such haynous and odious offences: And that Customes ought to have a respect to the place, he cyted the Case of 12 H. 3. where the Custome of the *Iste of Alan* was, That if any man stole a *Han* or a *Capon*, or such small

matter,

matter, that should be Felony, but if he stole a Horse that should not be Felony, for a man may privily convey away a Hen or might consume it, but for the smallness of the place, and being compassed with the water, he could not so doe with a Horse; So in 39. H. 6. That the married Wife of a Merchant in London, may sue and be sued by the Customs, and the reason is that London is the cheife City and place of Merchandise within the Realme of England, and it is conceived that the Merchants cannot be otherwise residents there but sometimes beyond Sea, or other where about their businesse and Affaires, and for that it shall be reasonable that his Wife shall sue and shall be sued in his absence, and in time of H. 1. Title Prescriptions, the custome of Haliham that if any Felon be taken with the manner, he shall be forth with beheaded, and this was as it seems for the better suppressing the common Felonies there committed, and so he concluded for this Reason, that this custome might have such reasonable beginning, and in respect of the place that should be a good custome.

His second Reason was, that this might begin at this day lawfully, Therefore this shall be good, and for that he cited the case of 10 H. 7. 21. That if a man make a Feoffment upon condition, that the Feoffee shall not commit Felony, that this is a good condition, but he said, that he supposed that if the Feoffee commits Felony, and the Feoffor enter into the land, and after the Feoffee is attainted of this felony, that now the Lord shall enter by Escheat, and his reason was, that the Statute of Westminster 3. De quibus major et terrarum, prohibits any man to make a Feoffment, to the prejudice of the Lord, to his Wardship or Escheat.

His third reason was, that this was a good Custome, inasmuch that this was annexed to an Estate created by custome, and for that he cited one Skerrey case to be adjudged in 24 years of H. 6. and was this, that is, The custome of a Manor was, that a married wife Copyholder might surrender to the use of her last will, and after might devise to her Husband, and it was adjudged, inasmuch that this was annexed in her Estate which began by custome, this was a good custome, and the 3. of Ed. 3. At the common Law such custome is void, and after he cited a Judgment in the point given in this Court, 23. of Eliz. Rot. 3014. or 3004 or 3004. that the same custome was adjudged a good Custome: after he answered some objections which might be made against this custome, that is,

First for the uncertainty of the time when the presentment shall be by the Homage, and so that he said that the Lord may make that when he will, and the time doth not take away the offence, and no prejudice upon that descends to the Heir, but is to his advantage.

Secondly, Because no number contains of the Homage, and that

that every tryall must be by twelve, and so that he answered, that we are not now in point of Tryall, but only for the information of the Lord.

Thirdly, this is against the nature of a Court-Baron to inquire of Felonies, and so that he said, there is not any inquiry made here, but only to inform the Lord, and such a thing is not against the nature of the Court which inlargeth this.

Fourthly, The offence is against the King, and a common person shall not have the punishment of that, so that he said the King shall not have any benefit of it, for he shall not have any Escheat of Copy-hold lands for Treason or Felony.

Fifthly, This is against the Kings Prerogative, so that he said, that Customs may be against the Prerogative of the King, as if a man claim Waife or stray by prescription, these are things given to the King by his Prerogative, and yet Prescription for them is good, and so he concluded this first point, that the custome was good.

To the second point he conceived, that this verdict and acquittal shall not conclude the Lord, and for that he said, that at the Common Law, if a Verdict had been given and no Judgment upon it, the party was not concluded to bring the same Action, 18 Ed. 5. 35. Then comes the Statute of a H. 4. And this ousts non-suit after verdict, and yet if verdict be imperfect, or finds a thing not in Issue, there non-suit may be after verdict, as it is sayd in 22 Ed. 4. 10. And if verdict be given in the point, and Judgment upon that, doth not conclude the party to have action of more high nature, as it is sayd in 3 Ed. 3. and 3 Affise 1. and Hudsons case in the 4 Coke, and as it is in Tryalls of Land, so it is in tryalls of life, as 2 R. 3. 14. 7 H. 4. 34. Then if the party himself shall not be bound by verdict, A fortiori, a stranger shall not be, also every Estoppel there ought to be a matter of estoppel, for the Jury is not sworn to give their verdict according to the truth in Deed, but according to the evidence to them given, and then if False evidence or no-evidence be given, it shall be hard that this shall conclude any of his right, also there is no party to be estopped because a stranger as is aforesayd, also the acquittal is in such manner, that is, that he hath not committed the Felony in manner and form as in the Indictment is alledged, and this doth not answer the Custome, because generall, so it seems to him, that this shall not be any conclusion to the Lord, and so for both points the entry not congnable.

Non-suit after  
Verdict.

And Stevens to the contrary, and it seems to him breiffly that the custome was not good, and he denyed the Rule, that is, that this might have reasonable beginning by agreement of parties shall make a custome good, and for this Littleton saith in his chapter of villainage,



that if the Lord of one Mannor will prescribe to have Fine, if any of his Tenants marry their Daughters without his license, this is a void custome, and yet it may be such agreement between the parties at the first, and it seems the custome not reasonable, for it is too generall, that is, if any Tenant, and this doth not exclude Infants.

Secondly, if any Felony be committed, and this includes petty Larceny, and Misme by involuntary means, for these are Felonies, and for that see, 13 H. 7. 19. 6 H. 7. That is Appeal of Mayme, a man shall count Felony, and yet it shall be hard that a man shall loose his Land for these Felonies. Secondly, Homage cannot inquire of the fact of Felony, but of the conviction of Felony, and so it seems to him the custome ill, and to the other point it furrow that the Lord shall be concluded, and to that that hath been objected that the Lord is a stranger to the verdict, and for that cause shall not be stopped, he said that the Lord is no stranger, for in this case every man is party, and every man may give Evidence for the King, and he cited the case in the time and title of Mortdancester, where the case was, where a man was as principall for the Death of J. S. and another as necessary in receiving the Principall, after the principall was out-Lawed, and the Accessary hanged, and the Lord seised the Land of the Accessary for Escheat, after came the principall and reversed the Out-Lawry, and was found not guilty, and the Heir of him which was hang'd, entered upon the Lord, and adjudged, inasmuch, that there cannot be an Accessary, unless there be a principall; that the entry of the Heir was lawfull in this case, so he sayd in this case, inasmuch that the Copsy-holder is acquitted by verdict and found not guilty, and seems to him that the entry of the Lord should not be lawfull, and by the whole Court the custome was good, but they did not deliver any opinion upon the second point, for they moved the parties to Composition.

Hillary 7. Jacobi 1609. In the Kings Bench.

### Barwick and Fosters Case.

*Reservation of  
Rent, Michael-  
masse, or ten  
dayes after.*

A Man made a Lease for two years at Michaelmas, rendering two shillings yearly during the Tearm, at the Feast of the annunciation of our Lady, and Michaelmas or ten dayes after, at the Feast of Saint Michael in the last year the Rent is not paid, the question was what remedy the Lessor hath for his Rent of this halfe yeare, and the opinion of Flemming cheife Justice, and Williams was, that he hath no remedy.

And first they sayd, as this case is, the Lessee hath election to pay either upon the Feast or upon the tenth day after, and that is for the benefit of the Lessor, then he hath made his Election not to pay that at the Feast

Feast of Saint Michael, then it is cleer that the Lessor hath no remedy by way of distress, for the Term is ended before; and by Action of Debt upon the Contract, he hath no remedy as it seems, as this case is, for the Contract is that the Rent shall be paid yearly during the Term, then when the Term is ended, the contract is determined, and for that the Chief Justice sayd, That if a man makes a Lease as Michaelmas for a year, rendering Rent yearly at our Lady day, and the ninth of October which is after Michaelmas, that the Lessor hath not any remedy for the Rent of the last halfe year, for that is not reserved to be payd yearly, according to the contract. And Telverton Justice agreed that the Lessee hath election as above, but he saith, when that is behinde the tenth day after Michaelmas, then the Lessor shall bring his Action of Debt, and declare that the Rent was behinde at the Feast of Saint Michael, and shall not make mention of the ten dayes after; and Coke Justice sayd, That it seems to him that the Lessee shall not have the benefit of these ten dayes after the last Feast, for the words of the Lease are (rendering Rent yearly) during the terme at the Feasts aforesayd, or ten dayes after; for that the Lessee shall have the benefit of these ten dayes during the terme; but not after, then he shall not have these after the last Feast of Saint Michael, for then shall the terme be ended. And after in Trinity Terme, 8 Jacobi, The Case was moved againe; and then Fleming Chief Justice conceived, That the Lessor shall not have ten dayes after the last Feast, and this upon construction to be made reasonably, for otherwise the Terme being ended, the Contract should be determined with the Terme, and so the Lessor should be without remedy for his Rent, and he sayd, that reservations are not taken so strictly, according to the letter.

And for that he cited the case of *Hill and Granger* in the Com. fil. 171. Where a man makes a Lease for a year. And the Lease was made in August, rendering Rent yearly at the Annunciation of our Lady and Michaelmasse, upon condition of Re-entry. In this case the first payment shall be at the next Michaelmasse after the making of the Lease, and not at the Annunciation of our Lady, though this is first in words, and this by reasonable construction, for otherwise this word (Yearly) shall not be supplied, and of this see the Action, and so he said in this case, Rent is reserved yearly during the Terme, at the Feasts of the Annunciation of our Lady or Michaelmasse or ten daies after, he shall not have ten daies after the last Feast. But *Williams* held his old opinion that the Lessor hath no remedy for the last halfe years Rent, and it was adjourned.

May 7. Jacobi, in the Kings Bench.

Grymes against Peacocke.

Grant of Com-  
mon extinct.

Exposition of  
Usage.

**T**HAT *Terspasse* for his Close broken, The Defendant justifies, that it was used within the Mannor of D. that every Farmer of such a house (and avowed, that that had been allwaies let to *Farme*;) had Common in the Lords waste: The house came into the hands of the Lord in Possession: And he granted the house and the waste to *J. S.* in Fee, *7. S.* Bargaines and Sells the house to *J. N.* with all Commons, Profits, and Commodities, used, occupied, and pertaining to the same: And after grants the waste to another: If the Grantee of the house shall have Common in the waste was the question: And *Terspasse* argued that the Common was gone, for if he shall have Common, this shall enure as a new Grant of a Common, but this cannot so enure for two reasons.

First, when a man will grant a Common, he ought to shew the place in certaine where the Grantee shall have this Common, or otherwise the Grant is void; But here no place is shewed, and for that it cannot enure as a new Grant of a Common.

Secondly, If that be a new Grant, yet this hath reference to the usage, that is, *Quod Usus est, hoc.* And this *Usus* is void, for it seemes to him that Lessee for yeares had not alledge a usage, for every (*Usus*) ought to go in one selfe same current, not interrupted as in the case of a Copyhold: But here every new Lease, is a new contract, and so the usage is interrupted, and then the Grant having the reference to the usage, and that is void usage, nothing shall passe by this Grant, and for that in *Long, 5. Ed. 4. 40.* If a custome be against Law: And that is confirmed by the Act of Parliament, this is void confirmation, for it hath reference to a void custome, so here this Grant hath reference to the usage, and for that it seemes to him that the Common is gone.

*Hutton* Serjeant to the contrary, and that the Grantee of the Messuage, shall have common, for this usage is not a thing by strictnesse in Law appertaining to the Land, but this hath gained his reputation, that that shall passe very well in a conveyance by apt words: And for that it will not be denied, but if a man makes a Lease for yeares to one, and grants him Common for all his Kine, &c. And after this Lease expires, and he makes a new Lease, and grants such Commons as the first Lessee had, that this shall be a good grant of Common to the Lessee: So he said in this case, this grant of the house with all profits and commodities used, occupied, and



and appertaining to the said Messuage, shall be said a grant of such Common, which other Lessees of this Mannor have used, and this by reasonable construction in Law, to make good the conveniences of Lay-men, according to the common speaking, for *Benigne sunt Faciende Interpretationes Chartarum*, &c. and for that he cited the case of *Hill and Grange in the Common*. Where the case was: That a man made a Lease for yeares of a house and a hundred Acres of Land appertaining to that, though the Land be not appertenant to the house, yet inasmuch that this hath been usually occupied with the house, this shall passe as appertaining to it, and so: 26. Affis: 38. A man makes a Lease for life rendering Rent, and after grants over the Rent to J. S. and dies: The Heire grants and confirms to the Grantee and his Heires, the same Rent with clause of distress, and the Tenant for life dies, now is the Rent reserved upon the Estate for life determined, and yet this shall enure as a new grant of another Rent in quantity: *So in Sir Moyle Finch's Case, the case of nses, and Durham in Ejectione Firme*: A Lease was pleaded of a Mannor, whereof the feilde in which, &c. Were parcell: And Mue was joyned, *Quod non Demisit Mannorium*: And upon this Mue found it was, that there were not any Freeholders, but diverse Copeholders, and this was alwaies known by the name of a Mannor: and it was adjudged that this shall passe for him which pleads the demise of the Mannor: There is in Judicall proceeding the Law makes such favourable construction to make that passe by a Mannor which is no Mannor in truth, because it hath been usually known by the name of a Mannor, then it comes to him, *in Fortiore*, that no more beneficiall construction shall be made in convenience, which alwaies shall be confirmed to the intent and meaning of the parties, and so it seemed to him that the Common remained, and *Croche, Fulverton, and the chesse Justice Fleming* conceived that in reason he shall have the Common, but they did not give any absolute opinion as to that: But *Williams Justice* in the contrary, and that the Lessee for yeares cannot have more, then he contracted for in his Lease, and thus the *Usum* void, and the Lessee have taken that by wrong: And this Grant having reference to a void and wrongfull usage, is not good, and it is adjudged.

*Hillary 7. Jacobi 609. In the Kings Bench.*

Stydson against Glasse.

Stydson brought an *Ejectione Firme* against Glasse: and upon speciall Verdict the case was this: that is, That one Holbeame was

*Ejectione Firme.*

*(ised.*

*seised of the Land in question in Fee, and made a Lease for life to Margery Glasse, and after covenanted with John Glasse Husband of the said Margery Lessee, that before such a day he would Levie a Fine to A. B. and to the Heires of A. of the same Lands, which Fine should be to the use of the said Glasse for sixty yeares, to begin after the death of the said Margery Glasse, with Proviso within the same Indentures, that if the said Holbourn at a certaine day should pay to the said John Glasse a hundred pounds, that then the Lease should cease, and then of that the Conusees should stand seised to the use of the said John for his naturall life, and after the said Holbourn disseised the said Margery Glasse the Lessee, and made a Feoffment to himselfe and one Alice, with whom he intended to marry, and to the Heire of their two bodies begotten, the remainder to the right Heires of the Feoffor, and after the said Feoffor and Alice intermarried, and after the said Holbourn tendered a hundred pound to the said John Glasse the Lessee for years, and after the said John Glasse assigned over his Teneme, and after the said Holbourn by Deed indented and enrolled, bargained and sold the said Land to the said John Glasse and his Heir, and after John Glasse dyed, and the Inheritance descended to the said Margery Glasse Lessee for life, the Conusor dies, his Wife enters, and dies to the Plaintiff, the Defendant enters upon him, and the Plaintiff recovers and brings Treasures against the Defendant, which justifies as servant to the Assignee of the Teneme, and if upon all the matter, &c. And it was argued by Nicholls Serjeant for the Plaintiff, and he moved three points in the case. 1. That the said Feoffment, which was made, had been Extinct by the Commandment for readiness to the Feoffor notwithstanding the Feoffment, so that he have interest in the Land, then it is extinct by the Livery, for it is given of the Feoffor and past out of him, and yet the Feoffee cannot have, and for that it is extinct, but if it were but Authority, as in a 5 H. 7. Authority to sell the land of the Feoffor, then the Authority is extinct, and is not extinct by the Feoffment of the land, so point of Revocation to a stranger which is but Authority is not extinct by a Feoffment. *Albains case Coke 113.* But if it be right in Interest, then it is extinct by the Feoffment, as power of revocation to the Party himself, resolved to the point in *Albains case*, so of Title to a Writ of Deceit, 38 Ed. 3.*

So of a title as a Tenant by the Curtille, 9 H. 7. 1. But by 42 Edw. 3. by a Feoffment made by a Parson of Land of his Rectory, the Tythes of that Land are not extinct, but remains notwithstanding the Feoffment, for that it was collateral to the title of the Land, as the Cases of Authority are, which were put before; then if this power to alter a Lease by payment of a hundred pound be

not any right nor Interest, but a collateral power, and the authority not extinct by the Feoffment, but remains; but admitting that it is in nature of an ordinary Condition, and that before the *Statute* it should be extinct by the Feoffment, for that it is the gift of the Feoffor, and yet it is not transferable to the Feoffee: If now by the *Statute* of 32 H. 8. which inables Grantees of reversions to take advantage of Conditions, if the condition be not transferred to the Feoffees, and so over, to he to whose use, that then by consequence this remains to the Feoffor, which was the he to whose use, and then the tender of the money after, well may alter the Lease; it seems that so, for before the *Statute* if a Lease for yeares had been made upon condition to cease, and after the Lessor enters upon the Lessee and makes a Feoffment, and the Lessee re-enter, and breaks the condition, the Feoffee shall take advantage of that condition, being by way of ceasing of an Estate; so after the *Statute*, the Feoffee of the Lessor shall take advantage of the condition of Re-entry, and of every other condition annexed to the reversion, as well as of one condition to cease, before the *Statute*, and as well that every Grantee shall doe since the *Statute*, for though that he comes in by Feoffment, which is wrong to the Lessee, yet after the re-entry, the Lessee is in nature of a Grantee: And he tyed the Case of *Clifford Error*, 7. Ed. 6. to be, that Lessor entred upon his Lessee and made a Feoffment, if the Lessee re-enter, the Rent and the Condition are revived againe and the Feoffee shall have both, see *Clifford Error*, 7. Ed. 6. Dyer the last case, and 1. M. Dyer 96. 43. but there is not any such matter, and for that it seems that he hath another report of this case of *Clifford Error*, or otherwise he meant some other case and not *Clifford Error*, so is our case the condition being inherent to the reversion shall passe with the reversion, be that by grant or feoffment, and when the reversion is revived by the entry of the Lessee, the condition shall be revived also, and it is the more strong, insomuch that the Condition is, that upon the payment of the money the Lease for yeares shall cease, and not that the Lessor shall re-enter, that such Feoffee shall take advantage of a condition by way of ceasing of chat at the Common Law: 2. point, and for the second point he would not argue against that, that he took to be cleer, and for that he conceived the Law to be against his Clyent in this point, though that after the Disseisin and Feoffment the free-hold could not accrue.

Thirdly, The third point was, that after the disseisin of the Tenant for life, he that had future Interest of a Term to begin after the death of the Lessee for life (during the disseisin) assigns over all his Interest, if this assignement be good or not, and he argued that not, for by him the disseisin of the Tenant for life, the



future Interest to commence after the death of the Tenant for life, is converted into a Right, and Right of a Tearme cannot be transferred over. For though that Lessee for years to begin presently, may grant over his Interest before his Entry, and it is well for that, that it is an Interest forthwith, yet if before his Entry the Lessor be disseised by a stranger, yet by him now, he cannot grant his Interest over for that, it is converted into a Right of a Tearme, but he ought to re-enter before that the Lessee may grant over his Tearme. So in our case, though that before the disseisin of the Lessee for life the future Interest was transferrable over, for that, that it was Interest, though that it was not a Lease in possession, yet when the Tenant for life was disseised then his Interest of a Tearme was turned into a Right of a Tearme, and then it is not transferable over till the re-entry by the Lessee for life, and he said that it was resolved by the 2. cheif Justices in the Star-chamber as he hath heard, that if Lessee for years be, and before his entry a stranger enters, and disseises the Lessor, that now the Lessee cannot grant his Tearme before that the Lessor hath entred, or he himselfe hath gained the Tearme in possession: And so it seemes to him, that the future Tearme doth not passe by this assignement, and then it is extinguished by the purchase which commeth after, and then the Justification of the Defendant as Servant to the Assignees not good: And so upon all the matter he praied Judgement for the Plaintiff.

*Williams* Justice said, that it was cleer, if a man have a Lease for years, to begin after the death of a Lessee for life, as is the case at the Barr, that though that the Lessee for life be disseised, yet the Interest remains good Interest to the Lessee, and is not turned into a Right of a Tearme, and for that he may grant it over, notwithstanding the disseisin, and so is *Sapphins* case 5. *Coke* 104. Otherwise if the Lessee for years had been any time in possession by force of his Lease, and it is Adjourned.

At another day the same Tearme the case was argued againe by *Telverton* of *Grays Inn* of the other part, that is for the Defendant, and first he said that the Plaintiff which claimes under the Wife, of *Hlabname* hath not any right to one *Moytie* cleerely, for the Husband and the Wife were Joynt-Tenants before the coverture: So that they take by *Moyties* and not by Intirities, and when the Husband bargaines and sells all, that is a seperation of the Joynttenancy, and his *Moytie* is gone for ever, as it appears by 3. *M. Dyer* 149. 82. So that for one *moytie* it is cleer, that the Plaintiff hath not any right any way, how ever the case prove, for the other *Moytie*, and this *Moytie* which was conveyed by the Husband is descended to the Defendant, which hath no speciall  
outer

outer found by the Verdict: But only that he entered which he well might, having the other halfe, and then no Trespasse found by the Jury, and also the Damages found by the Jury are Intire, and then being no cause of Damages for part, there shall be no Judgement for the residue: And the first point that he moved was, if after this disseisin and feoffment over, the Feoffor might tender the money to cease the first Estate, and it seemes that not, for the Free-hold cannot accrue, as it seemes to him by any tender after his disseisin, and so it hath been agreed to him as he said by the Councell of the other part, and then by him this condition consisting of two parts, this is Disseisin of one Estate and Accruing of the other Estate, if by this disseisin the condition be destroyed, for the accruing of the Estate, it seemes also that it shall be destroyed as to the ceasing of the first Estate; for if a condition be destroyed in part it shall be destroyed in all, for it is Intire and cannot be apportioned, and by consequence if one Estate cannot accrue, the other shall not cease: And he resembled it to the case in the 14. H. 8. 17. And *Parkins*, condition being in the Coppulative one part being dispenced with the other, was a discharge, so when a man hath election to do one of two things, if one be discharged (though that it be by the Act of God) as by death, &c. Yet the other shall be discharged by the Law, as it was in *Langtons Case* 5. *Coke* 22. *Forriars* when one is discharged by the Act of the party, also by him if he had made any Feoffment after this disseisin, yet the very disseisin would destroy the accruing of the Estate, for though that he do not gaine Fee by the disseisin but only Estate for life, and retains his old reversion in him, according to 9. H. 7. 25. Yet the Fee and the Free-hold are so conjoynd by descent of that Estate alters an entry, as it appears by 3. *Ed.* 3. Entry Congeable 58. And if he in reversion disseise Tenant for life, the Contingent uses shall never rise, by *Chidleys Case* first of *Coke* 158. Condition that he retain his old remainder, no more of the accruing of the Fee in our Case, for by him it appears by 18. *Ass.* and *Nicholls Case Com.* That Estate ought to accrue upon possession, or at least upon an Estate in being, and not upon a right of an Estate only: And for that he cited 6. R. 2. *Plashingtons Case*, Lease for years upon condition, that if the Lessee be outed he shall have Fee, though that he be outed yet he shall not have Fee, for that, that at the time of the condition performed he had but a right of Yearme, and no Yearme in possession, so in our case after the disseisin, he having but right the Estate cannot accrue.

Secondly if the Grantee, or he to whose use, may performe the Condition, either by the Common Law, or by *Statute Law*: And he conceived that none of these might performe that, for first at

the common Law, though that Grantees of reversions may take advantage of a Condition by way of cesser of Estates, upon the condition performed, yet this is only when the condition was to be performed of the part of the Lessee, and so was the case cited by Serjeant *Nicholls* of 11 H. 7. but if the condition were of the part of the Lessor, otherwise it was, as the Book is in 26 H. 6. Entries. And then a *Fieri* here, the Assignee of a Disseisor cannot performe the condition, which may be performed of the part of the Lessor.

But he agreed the case of *Littleton*, that an Assignee of an Estate may perform a condition in preservation of an Estate, otherwise of an Assignee of a Reversion, in destruction of an Estate; so at the Common Law it is clear, that the Feoffee cannot perform the condition, and by him it is cleerly out of the *Statute* of 32 H. 8. for this *Statute* doth not extend to a collaterall condition, as it appears by *Spencers case* 5. *Coke*, and so hath been many times after this adjudged, and this is a collaterall condition, *Ergo*, &c. And so concluded, and prayed judgment for the Defendant.

*Nicholls* Serjeant to the contrary, and that this Disseisin hath not suspended the condition, but that he may pay the Money, and make the Estate to cease notwithstanding the Disseisin, for that the condition is collaterall, like to the 20 of *Ed.* 4. and 20 H. 7. That where a Feoffee upon a collaterall condition takes back an Estate for years, yet this shall not suspend the condition, but it may be performed or broken, notwithstanding the Lease, for that that it is collaterall, so in our case, for suppose that the condition had been if he marry *Mistress Holbeame*, that then his Estate shall cease, and as well it shall be upon the Tender of the Money here, and he said that this case was late in the Common Bench. This feoffment was made to the use of the Feoffor for life, Remainder to another for life, the Remainder to the third in tayl, the Remainder to the right Heirs of the Feoffor in fee, with power of Revocation, and after the Feoffor lets for years, and during the Term he revokes the mesne Remainders, and it seems to the Justices that well he may, for that that the Lease for years goes only out of the Estate for life, as he sayd, and for that the power of Revocation as to the Mesne Remainders was not suspended, *Quere* of the truth of this case in the common Bench, for perchance it is not truly collected, but so entred, and so he prayed judgment for the Plaintiff.

*Fleming* these Justices sayd, that the point of the principall case would be, if by the wrong of the Lessor the Estate of the Lessee shall be prevented to accrue, then he might perform the condition to determine the ancient Estate, that is, the Lease for years, and it is

burned.  
 Rask.



Pasch. 8. Jacobi 1610. *In the Kings Bench.**Earle of Shrewsbury against the Earle of Rutland.*

**I**N a Writ of Errour, the Earle of *Rutland* brought an Assise of Novel Disseisin against the Earle of *Shrewsbury* and four others, and the Plaint was of the office of the keeping of the Park of *Clepson*, and of the vailes and fees of the sayd Parke, and of the Herbage and Paunage of the same, and the Demandant made his title, and alledged that the *Queen Eliz.* was seised of *Clepsum* Park in fee in right of her Crown, and that she being so seised by her Letters Patents under the great Seal, granted unto one *Markham* the keeping of the Park of *Clepson*, with the vailes and fees, and the Herbage and Paunage of the same Park for his life, after the *Queen Eliz.* reciting the Grant made to *Markham*, and that *Markham* was alive, gave and granted by her Letters Patents, to the Earle of *Rutland* the Office of the keeping of the sayd *Clepson* Parke, with the Fees and Wages to that appertaining, to have and to hold to him for his life, after the death of *Markham* or after the Surrender, or forfeiture of his Letters Patents, and further granted the Herbage and Paunage to the sayd Earle of *Rutland* for his life, and doth not say when this shall begin, after which the *Queen Eliz.* died, and the Bee-simple descended to our Lord the King, which now is as lawfull Heir to the Crown of *England*, which granted that to the Earle of *Shrewsbury*, after which *Markham* dyed, and the Earle of *Rutland* entered, and was seised till the Earle of *Shrewsbury* with four others entered upon him, and disseised him, and to that the Tenants alledged no wrong no disseisin, and when the Assise was to be taken in the Country, the Array was challenged by the Tenants, for that that one of the Tenants in the Assise, had an Action of Trespasse hanging against the Sherif, and this challenge was not allowed, and the Assise being perused at large for the Herbage and Paunage, they found, that the said *Queen Eliz.* was seised of *Clepson* Park as aforesaid, and by her Letters Patents as afore is rehearsed, granted the Keeping of this to *Markham* for his life, and further by the same Letters Patents granted to him the Fees and Wages to that belonging, and further granted by Letters Patents, and doth not say. (*Easdem*) to him, the Herbage and Paunage of the sayd Park, and that the *Queen* after the reciting the Grant made to *Markham*, and that *Markham* was alive, granted to the Earle of *Rutland* the keeping of the sayd Park and vailes and fees, to have and to hold after the death, surrender, or forfeiture of the Letters Patents of *Markham* for his life. And further

Errour.

further by the sayd Letters Patents, shee granted the Herbage and Paunage of the same Park to him for his life, as more fully appears by the Letters Patents, and it was not exprest, as to the Herbage and Paunage when that began, and they found the death of *Markham*, and that the Earle of *Rutland* put two Horses into the sayd Park to take seisin of the sayd Herbage and Paunage, and they found further the grant of the King to the Earle of *Shrewsbury* of the fee-simple, and of that prayed the advise of the Court, and to the keeping of the Park they found the seisin and disseisin of that, and of the fees and wages to the Damniages, &c. And this being adjourned into the Common Bench, was remanded into the Country, and there Judgment was given for all for the Demandant, and after this it came into the Kings Bench by Writ of error, and the Errors assigned by the councill of the Tenants, and argued at the Barr were foure.

The first was that the Earle of *Rutland* himself, between the verdict and the Judgment hunted in the Park and kild a Buck, and took a shoulder of that for his fee, and so he hath abated his Assise, and so the Judgment was given upon a Writ abated, and therefore they cannot plead that in abatement, insomuch that it was mesne betwixt the Judgment and the verdict, they assigned that for error.

The second was, because the principall challenge was not allowed, where that ought to have beene allowed, and the challenge was, that one of the Tenants had an Action or Trespasse hanging against the Sheriff before the Assise.

The third was, Because the Jury have found the Letters Patents made to *Markham*, and that the Queen granted to him by her Letters Patents the custody of the Parke of *Clepston in Clepston*. And further by the same Letters Patents granted the vailes and fees, &c. And further granted the Herbage and Paunage, and have not found that this was granted by the same Letters Patents, and then if this be not granted by the same Letters Patents, then there is not any grant of this to the Earle of *Rutland*, because there is no receiptall of the Patent by which the Herbage and Paunage was granted to *Markham*.

The fourth error was, that they have erred in point of Law, and to that the point is but this, the King grants the Herbage and Paunage of a Park to one for life, and after reciting that grant, and that the Patentee is alive, grants that to another, and doth not say when that shall begin, and it seems to them that the Argument for the Plaintiffes in the Writ of error, that this was a voyd grant, and so the Judgment erroneous, but I have not the

Report

Report of the Arguments of the Concellors at the Barr, but only of the Judges, which moved two other errors in the case, not moved by the counsell at the Barr, and *Crooke* Justice rehearsed the case as before.

And to the first error he conceived that this is no error, and that for two reasons,

First, He took a difference between a thing which abates the Writ by Plea, as if a man brings an Assise against another, and mesne between verdict and Judgment, the Plaintiff dies, this matter shall abate the Writ without Plea, and for that if Judgment be given upon such verdict, the Judgment is erroneous, but in our case an entry doth not abate the Writ without pleading that, and now as this case is, this cannot be pleaded, being between Verdict and Judgment, and for that it shall not be assigned for Error, see 19 *Assise* 8, Where this difference is taken, and agreed.

*Abatement of a writ by entry.*

Secondly, Admit that this entry might have abated the Writ in *Falso* without Plea, yet there is no such entry alledged, which might abate the Writ in *Falso* without Plea, for the entry is alledged that the Earl of *Rutland* entred to hunt, and kild a Buck, and took a shoulder of that for his fee, and it seems that this is no such entry that shall abate the writ, for he hath now entred to another purpose to hunt, the which he could not do, but the entry ought to have been alledged that he entred to keep, for in every entry the intent of the Entry is to be regarded, and to this purpose he cited the case of Assise of *Freshforce*, *Com.* 92. and 93. Where entering into the Seller hanging the Assise of that, to see the Antiquity of the House, there was no Entry to abate the Writ and the case of 26 *Assise* 42. where the Disseisee, hanging the Assise comes and sets his foot upon the Land, but takes no profits, and adjudged that he should recover notwithstanding, so in this case the intent is not shewed, that is, that he entred to keep possession but to hunt, nor was it such entry which should abate the writ, and to that which is sayd that he kild a Buck, and took the shoulder of that for his fee, this doth not help, for if that had been a Buck which he might to have kild by vertue of his Office, he ought to have shewed his warrant, for otherwise a Parker cannot kill a Buck if not that it be for his fee, and then he shall have the Buck, and not a shoulder only, also it is alledged that he took a shoulder, and doth not say the best shoulder or the right shoulder, and this ought to be shewed in certain.

And so for the first Error he conceived that this is no cause to reverse the Judgment, and to the challenge he sayd, that he would speake to that at the last, and for that he now spake to the errors supposed in the grant.

And



Markhams  
Grant.

And first to *Markhams Grant*, where the Jury found the *Queen Eliz.* granted to him the keeping of the Park, and by the same Letters Patents grant the fees and Wages, and further granted by her Letters Patents, and doth not say (*Eadem*) the Herbage and Pannage, it seems to him that this is very well, for two reasons.

First, inasmuch that there is a copulative, which is this word (*Et*) and also a Relative, which is this word (*Uterius*) and this word conjoynes the matter precedent with the subsequent, and the word (*Uterius*) hath necessary relation to the same Letters Patents, and so *Ex precedentibus & subsequentibus*, the Jury hath well found the matter.

Earle of Rut-  
lands Patents.

Secondly, these words are supplied in the second Patent, for there the Jury have found that the *Queene* hath granted that to *Markham* by the same *Letters Patents*, and so for these two reasons he concluded that this is no Error to reverse the Judgement: And to the Patent made to the *Earle of Rutland*, it seemes to him also, that this is very good, and all that he said in effect was, that in construction of the Patents of the King, such exposition is to be made, that if any reasonable meaning may be conceived, they shall not be defeated but shall stand good: And so he said in our case, that it is necessarily intended that this was also to begin after the Estate of *Markham* determined, and for that good: And he said that a man ought not to make a curious and captious interpretation of the Kings Patents, for *Talis Interpretatio in iure Reprobatur*: And to the challenge, that seemed unto him a principall challenge, and this not being allowed, where it ought to be allowed, this is an error, as it is laid 8. of *Affises* 23. and for this error it seemes to him that the Judgement shall be reversed, and to that he said he relied much upon the book of 11 *H.4.* 25. which takes a difference between Debt and Trespasse for battery, for the booke saith that a man may demand his Debt, without giving occasion of any malice: But Battery is an evill Action, and there the book is resolved, that it shall be a principall challenge, and so he saith in Trespasse, this being with force and Armes, that, &c. And in 8. *H. 5.* in a *Affise*, the Tenant challenges the array, because he had an Action of Trespasse hanging against the Sheriff: And there the array was affirmed because it appeares that the Defendant had brought this Action by Covin against the Sheriff, which case proves, as he said, that if there be not any Covin this is a principall challenge, and 38 *H. 6.* 7. accordingly, and the case 28. *Affise* 11. where the Defendant in *Affise* challenged a Juror, because he had an Action of Trespasse hanging against him, and was outed by award, and in 21. *Ed. 4.* 12. it is said where there is an apparent favour, or apparent displeasure, there shall be principall challenge, and certainly though  
the

Challenge.

the Law may intend, that a man may lawfully demand his right; and without malice, yet it appeares that the nature of men is perverse and froward, and few Actions are begun without apparent displeasure, especially Actions of Trespasse, *Pedibus Ambulando*, and vexation plainly appeares; when Actions are begun upon such slight occasions, and in Actions of Trespasse there issueth a *Capias* for a Fine, and so the Defendant shall be Fined and Imprisoned, and sure to be deprived of his liberty is a thing distastefull.

And it cannot be but that displeasure shall be between them, which endeavour to reſtraine one the other of their liberty; and so be concluded that this was a principall challenge, and not being allowed this is error, and so for this cause he reversed the Judgement: Also it seemed to him as this case is, there is no seisin found of the Pannage, for the Jury have found that the Earle of Rutland hath put in two Horses, and it seemes to him that Horses cannot take seisin of Pannage, which is properly meate for Hoggs, and so for this reason also, inſomuch that there is no seisin found of the Pannage, and the Jury ought to find of necessity a Seisin and Defseisin, it seemes to him that this is error, and so the Judgement ought to be reversed, and at the same day *Williams* Justice rehearsed the case as before, and in his argument he spake.

First, to Grants. Secondly to the challenge.

Thirdly to the abatement of the Writ; And it seemes to him, that none of these matters were sufficient to reverse the Judgement, but yet he conceived for two other causes that the Judgement shall be reversed.

And first concerning *Marbham's* Patent, that the Jury have found very good, though that they have not said by the same *Letters Patents*, but he said that it had been more proper if they had found that the King had granted that by the same *Letters Patents*, and for that he cited the case of Information of Mines in the *Com.* And the pleadings before the case, there the *Letters Patents* of the King are pleaded; and where the King grants divers things, it is there said, that the King by the same *Letters Patents* granted, and so the case of *Grendon* against the Bishop of *Lincolne*, where the King by his *Letters Patents*, granted to a Deane and Chapter that they should hold an Advowson to their proper use, and further granted by the same *Letters Patents*, &c. And so he said in this case that this had been more properly found; if it had been found that the King (*Per Easdem Litteras Patentes*) granted, yet this is very good as it is, and this as he said by the Intendment, for it cannot be otherwise intended, and for that he cited the book of Entries in Title Covenant: That where a man brings a Writ of covenant, and counts upon an Indenture, that is, that the Defen-

dant covenanted to do such a thing, and further covenanted, and doth not say by the same Indemure, yet this is very good because it cannot be otherwise intended, but when that is by the same Indemure, and where things shall be taken by Intendment, he cited the case of 5. *Ass.* 2. Where in *Assise of Common*, the Plaintiff made him Title, that is, that he was seised after the Coronation of King *H.* this shall be intended *H.* 3. See *Brooks* Limitation 4. and the Case of 17. *Eliz. Dyer* 343. Where these Letters *H. R. A. F.* shall be intended *Henricus Rex Anglie Francie &c.* And he cited the case of 21. *H.* 7. 32. Where a man pleads a release made in *Villa de West.* the Countrey of *Middlesex*, and doth not say secondarily, *In Predicta Villa*: And there these Justices held that good, and it shall be intended the same Town, so he said in this case, this shall be intended that Grant by the same *Letters Patents* (though that (*Et adem*) be left out: And to the Grant to the Earl of *Rutland*, he held that good, also though that it is not expressed as concerning the Herbage and Pannage when that should begin, and he said that this is also for the intent, and also he said that this is not in prejudice of the King, nor in deceit of the King, nor to the double Intendment, and for that good: And he put the case where the King makes a Lease for one and twenty years rendring Rent, and doth not shew when that shall begin: That shall begin from the Date of the *Letters Patents*, because it cannot be otherwise intended, so in the principall case the grant of the Herbage and Pannage depends upon another Grant: That is, the custody of the Parke which was to begin after death, surrender, or, &c. of *Marston*, and having relation to that by this word (*Wherunto*) that shall be necessarily intended to begin at the same time, and he well agreed the bookes of 3. *H.* 7. fol. the last, and 6. *H.* 7. 14. 8. *H.* 7. 1. 9. *Eliz.* 259. 7. *Ed.* 6. *Dyer* 80. That there is no reversion of an office: But yet the King may grant an office after the first Grant determined, and this shall be good: And so shall be in our case of the Herbage and Pannage, and he cited the case of 8 *H.* 7. 12. 23. where the King was Founder of an Abbey, and he had granted a Corody to another for life, and after he released that, and granted it to the Abbot, this shal not be a good release presently, because another hath the possession for present of it, but this shall be good after the death of him which hath this granted for his life: And he cited the case of the Lord *Chandos* 6. *Cal.*, where the King grants the Mannor of Dale in taylor, and after grants the Mannor to another, this shall passe the reversion, for this is all that the King can passe: So he said in this case, this shall passe in such manner as it may passe, by which be concluded the Grant to the Earl of *Rutland* good: Also to the challenge, it seemed to him it is no principall challenge, and

Earl of Rut-  
lands Patents.

challenge.



and for authority he cited the case in 11. H. 4. That hath been cited of the other part, which was for him as he said, for this takes the difference between Debt and Battery, and 38. H. 6. a Juror was challenged because one of the parties had an Action of Trespasse hanging against him, and this was not any principall challenge, unless it be Trespasse of Battery, and to the booke of 20. Affis. 11. Where a Juror was challenged, because he had Trespasse against him before the Assise, he said it did not appeare by the booke, what Trespasse that was: So it shall be intended Battery, and he concluded with this difference, that if such an Action be hanging which tends to the utter undoing of him, against whom it is brought, then if the Defendant in such Action make the array, this shall be a principal challenge, but if it be but such an Action in which a man shall recover but his Debt or Damages or such lawfull duties; there to say that such Action is hanging between them, at the time of the array made shall be no principall challenge: And for that he cited the booke of 24. Ed. 3. Where a *Tales* was returned by the Sheriff of *Middlesex*, and the party challenged the Jury, because he sued the Sheriff for the death of his Servant, and this was a principall challenge, for in such case his life was in question; the same Law in case of Maintenance and Champerty, for the Law hath inflicted great punishment upon such Offences, so these matters tend to utter subversion of his Estate and life, but otherwise in Actions of Trespasse, and so he concluded no principall challenge: To the abatement of the Writ it seems no Error.

First he conceived that there is no entry, and for the reason that *Croky* had given before, that is, because he entred to hunt, and not to keep possession, and hath not shewed any Warrant to kill the Buck, and he cited the booke of the 9. of Ed. 4. fol. 60. Where *Babington* brought an Assise of the house of the *Fleets*, and hanging the Assise, *Babington* came to the Jury within the house (when they had the View) with his Councell to shew Evidence for the view, and this was not any entry to abate the Writ, and so the entry to hunt is an entry for another purpose then an entry to keep possession (not being by warrant as it is not found) and for that no entry to abate the Writ: But admitting that this had been an entry to abate the Writ, yet being a thing which doth not abate the Writ without Plea, and that cannot be pleaded as the case is, he conceived was no Error, but if it had been a thing which abated the Writ in *Falso* without Plea, then to give Judgement upon a Writ abated is Error: As if the party die hanging the Writ, or if a woman sole brings an Assise, and takes a Husband hanging the Assise, or if the Plaintiff in a Assise be made Judge of a Assise, as the 13. of Assise, in all these cases the Writ is abated in *Falso* without Plea:

H h 2

But

But entry shall not abate the Writ without Plea; and so it seems to him no error: But he conceived that there were two other errors, for which he reversed the Judgement.

*Variance.*

The first was, that this *Affise* was of *Libere Tenements in Clepsom*; and the plaint was of the keeping of the Park of *Clepsom* and of the Herbage and Paunage of the Parke aforesaid called *Clepsom*, and made his Title for Herbage and Paunage of the Park of *Clepsom*, and so he conceived that there is variance between the Plaint and the Title and Park of *Clepsom*, and *Clepsom* cannot be intended one, without speciall averment, and for that he conceived it to be error. And to that he cited the case of twelve *Affises* two, Where in attaint the first originall was of the Mannor of *Ausby*, and the Attaint was of the Mannor of *Ausby*, and yet for that chat the Attaint is founded upon the Record, and not upon the Originall, and the Record was of the Mannor of *Ausby*, this was very good, but the Booke saith, that this variance between the Originall and the Record, was sufficient to reverse the Record for error, and the case in 42 of *Ed. 3.* Where *Scire facias* was brought of Tenements in *Eastgrave*, and the Fine was of Tenements in *Deopgrave*, and for the variance the Writ abated; and in the case of 5. *Coke* 46. *Formedon* was brought of the Mannor of *Iseild*; and the Tenant pleads in barr a recovery of the Mannor of *Iseild*, and this shall not be amended unlessse it appear that this is a misprision of the Clerk or by other averment, he cited also the case of 3. *H. 4.* 8. *Scire facias* upon garnishment in a Writ of *Devinus* of writingt, the Originall name *John Scirpsend*, and the *Scire facias* was made *John Shiplew*, and therefore agreed that he shall due a new *Scire facias*, so he said in the Principal case the Plaint being of Herbage and Paunage of *Clepsom* Parke, and the title being at *Clepsom* Parke, these shall not be intended to be the same Parke without averment, and there is no averment in our case, and for that such variance is such error, that shall reverse the Judgement.

*Seisin.*

The second error for which he reversed the Judgement was that which was moved by Justice *Crook* that the Jury have not found any seisin of the Paunage, for it seemed to him that a Horse could not take Seisin of paunage, and for that he defined paunage, and he said that *Linwood* title Tithes saith, the *Pannagium est pastus Porcorum*, as of Nuts and Akornes of trees in the wood, and *Crompton* saith, that this is, *Pastus Porcorum*, and he saith that *Pannagium* is either used for Paunage, or the Paunage it self, and the Statute of *Charls de Foresta*, saith; that every freeman may drive his Hogg, into our royall Wood, and shall have there Paunage, but he doth not say Horses or other Beasts, but he conceived that if the Earle of *Rutland* had right in the Park, that this had been sufficient.

sufficient seisin of Herbage and Pannage also, for Hogs will feed upon grass as well as upon A Hornes, and he cited the Book of 37 H. 6. saith that Seisin to maintain an *Affise*, ought not to be of a contrary nature to the thing of which seisin is intended to be given, but in one case only, and that is where the Sheriff gives seisin of a Rent by a Twig or by a Clod of Earth, and this is in case of necessity, for the Sheriff cannot take the Money out of the purse of the Tenant of the Land, and deliver seisin of that, and for that he cited the case in 45 Ed. 3. Where Commoner comes to the Land where he ought to have Common, and enters into the Land, and the Lord of the Waste or the Grantor of the Common ousts him, he cannot have an *Affise* of his Common upon this ousting, for this was not any seisin of the Common: so it is in this case, the Horses cannot take Seisin of the Pannage, and so there is no seisin or disseisin found by the Jury, and then no *Affise*, and this being after Judgment, no abridgment may be of the Plaint, and so for these last reasons he reversed the Judgment.

And at another day the case was rehearsed again and argued by *Yelverton* and *Fenner* Justices, but I did not hear their Arguments, inasmuch that they spake so low, but their opinions were declared by the cheife Justice, and *Yelverton* affirmed the Judgment in all.

*Abridgment of  
the Plaint in  
Affise.  
Yelverton.  
Fenner.*

First he held that this entry shall not abate the writ.

Secondly admit that it is abated, yet being between Verdict and Judgment shall not be assigned for error.

Thirdly, he held that no principall challenge.

Fourthly, he held both the grants good.

Fifthly, that *Clepsam* and *Clipsam* are all one, and not such variance that shall make Error.

And lastly, that a Horse may well take Seisin of Pannage, and *Fenner* agreed in all, but he held that this was a principall challenge, and not being allowed this was Error, and for this cause and another exception to the Record, which was not much materiall, he reversed the Judgment.

*challenge prin.*

And at another day *Flemming* cheife Justice rehearsed the case, and this argued, and to the first matter he conceived.

First, That it is no such entry that abates the Writ.

Secondly, Admitting that it were yet this cannot be assigned for Error.

And to the first matter he took this ground, That every entry which may abate a writ ought to be in the thing demanded, and for that he sayd, if a man brings an *Affise* of Rent or common, and hanging this *Affise*, he enters into the Land, this is not any Entry, which will abate the Writ, and he sayd that the Park, and the

*Flemming.*



the keeping of the Park are two distinct things, and for that the entry into one, that is, the Park will not abate the Writ for the keeping of that, and to that which is sayd that he took a Fee, that is, a shoulder of a Buck, that doth not make any matter, for two reasons.

First, he hath not shewed a Warrant he had to kill the Buck.

Secondly, the taking of the Fee is no entering into the Office, but the exercising of that, but admit that this were an entry, or the thing it self, yet he sayd every entry into the thing shall not abate the Writ, and to that he sayd, that if this entry of the Earl of Rutland to hunt was no such entry that shall abate the Writ, for his office was not to hunt, and for that his entry being to another purpose, it shall not be sayd an entry to abate the Writ; and for that he cited a case, which hath been cited, as he sayd, by Justice Tylberton, that if a man have Common in the Land of *S.* between the Annunciation of our Lady, and *Michaelmas*, and the Commoner brought an *Affise* of his Common, and at *Christmas* put in his Beasts and this shall not be any entry to abate his Writ, for it cannot be intended for the same Common, which case is agreed to be good Law, and he cited the case put by *Brooke* in *Affise of Freshfore* before remembred *Com. 93.* Where hanging a Formedon, the Tenant pleads in abatement of the Writ, that the Demandant hath entred after the last continuance, and upon the evidence it appears, that many were cutting wood upon the Land, and the Demandant comes into the Land to them, and warnes them upon the perill that might ensue to them, that they should do no more then they could do by Law, and this was found no entry: Also the case of *26. Affise* before cited by Justice *Croke*, and he sayd that the Statute of *Charta de Foresta*, chapter *11.* willeth, that every Arch-Bishop, Bishop, Earl, or Baron, comming to the King by his command, and passing by his Forrest, &c. Was licensed to take one Beast or two by the sight of the Keeper, &c. Put case then, that the King had sent for the Earl of Rutland, and he had passed through this Park, and had killed a Buck, had this beene an entry to abate this writ, *Quod dicere non;* for this was entry to another purpose, so he sayd in the principall case the entry to hunt, and so no entry to abate the Writ, but admitting that this had been an entry, which would abate the writ, then let us see if this entry hath so abated the writ, being Mesne between the Verdict and the Judgment, it cannot be assigned for error, and to that he agreed the diversity before taken by *Croke* and *Williams*, where the writ is abated by Plea and without plea, and he cited a Judgment in the Kings Bench, between *Jackson and Parker & Ellis*, wherein *Ejectione firmæ* the Plaintiff entered Mesne between Verdict and Judgment, and this was assigned for

what matter  
shall be assign-  
ed for Error  
after Judge-  
ment.

for Error in the Exchequer Chamber, and the Judgment notwithstanding affirmed, and he said that if *Memorandum* had been made of it, or if a Jury had found it, and it had been prayed that that might be Recorded, yet this had not been material, and that that be not assigned for Rapour. And to the master moved by my Brother *Williams*, that there should be a variance between the plaint and the Title, he conceived that there is no such variance, that shall make the Judgment erroneous, and so that he examined the matters.

Variance,

First that the *Assise* was of a free-hold in *Clefsom*, and his title is made of the park of *Clefsom*, that that cannot be otherwise intended, but that of necessity it ought to be the same park.

For first there is but one park by all the Record. Secondly, the plaint saith, *De parko predicto*, which hath reference to *Clefsom* park, and there is but one park put in view by all the record.

Fourthly, it shall be so taken according to the common speaking.

Fifthly, when he hath made the plaint of the custody of the park of *Clefsom*, and of the Mesuage and primage of the park aforesaid called *Clefsom*, these words (called *Clefsom*) are but Idle and Trifles, and that which is not Surplage shall not annoy. Also he said that *J* and *E*, are letters which do not much differ in pronunciation, and they are all one as *I* and *E* shall be pronounced as *de*; and he cited the Book of 4 H. 6. 26. Wherein Debt, variance was taken between the writ and the Obligation, that is, *Quia verbum pro Quia* *verbum*, and this variance was not material, but that the writ was awarded good, and so he conceived that in this case the variance of *Clefsom* and *Clefsom* shall not be such a material variance, that shall make the Judgment erroneous, and so the title was.

First to *Marshall* grant, that is, where the Jury have found, *Quia verbum canonicum*, &c. And doth not say, *Per verbum*, he held that good without scruple, and that for due necessary religion, that this had no any thing before granted; for he said that this should be a strange and marvelous patent which began in such manner, that is, *Et ultra sit et contra sit*, &c. And there was no any thing granted before. And for that he cited the case of 1 H. 4. 2. where Debt was brought upon an Indenture against the Abbot of *Walsingham*, and the Indenture was between the Abbot of the *Abbey* of the blessed *Mary* of *Walsingham*, and several other Governors, for performance of which Covenants, the Abbot of *Walsingham* bound himself in twenty pounds; and doth not say that the aforesaid Abbot, and yet good, for it shall be intended the same Abbot, for so it is parry to the Debt; and this case is so cited.

Where

Challenge.

Seisin.

Wherein the Barl of Rutland makes his plaint of Com-  
mon appurtenance called Five hold in D. and shews for Title, that  
he was seised of a Messuage, and of a Carve of Land in D. to which  
the Common is appurtenant, and that he and his Ancestors, and all  
those who succeeded him, have used Common of pasture with ten  
Beasts, and does not shew to the title, because he saith that he was  
seised, and not fairly, but he is, and yet good by this word (Fair) for  
that shall be intended that he continues seised, so he sayd that things  
which are necessarily to be intended, though they be not so parti-  
cularly expressed, yet shall be good by implication, and so he conclu-  
ded that this is no Bar, for which the Judgment shall be reversed.  
And to the challenge, he conceived that this is not any principall  
challenge, and to that he put this difference, that if a man brings  
an Assise of certain Land, and hath an Action of Trespass hanging  
against the Sheriff for entering into the same Land, there shall be a  
principall challenge to the Array, but if it be for entry into other  
Land, notwithstanding the trespass, and what is principall chal-  
lenge, and what not, he cyted the 1. 2. 3. Ed. 4. 12. 6 Ed. 4.  
1. 2. 3. Ed. 4. 12. 6 Ed. 4. 1. 2. 3. Ed. 4. 12. 6 Ed. 4. 1. 2. 3. Ed. 4. 12. 6 Ed. 4.  
and to the point in que-  
stion, he cyted the Bookes before remembered by *Crane and Will-*  
*iam and me others*, and (for that I come to rectify them, and be-  
cause I did this in poems which I wrote, I thought I might  
have said so by this that hath such a fine hanging against the Sheriff,  
shall be a principall challenge, but I think for entering into Land not,  
for in Trespass there is no Land to be recovered, also no damages but  
to the value of the Trespass, and so he conceived that he should recover more than in Trespass. And yet  
it was said that this is no principall Challenge to say, that he hath  
an Action of Trespass hanging against the Sheriff, as the Book of 1. H.  
4. is, which hath been remembered; and for this I conceive is no  
principall challenge. And to the seisin of the Pastures, if a Horse  
may take seisin of that, it seemes that yes, for I conceive that the  
taking of seisin doth not consist in the eating, or not eating of that,  
of which they feed, but in the eating, and for this he cited, that if a  
man grant to me the Marriage and Pasture of his Parke, and I come  
into the Parke and take the Grass and Herbs into my hands, or if  
I gather Almonds, this is sufficient seisin for me to have Assise,  
though I shall damage each the Grass, and the Almonds, and for  
that, as for the seisin, I have been granted to him,  
and he puts in his Beasts, and before that they enter the grass,  
they shall drink, and he will deny, that that, that shall be good  
seisin, for so is the Book of the 1. H. 4. 1. 2. 3. Ed. 4. 12. 6 Ed. 4. 1. 2. 3. Ed. 4. 12. 6 Ed. 4.  
and because the Beasts of a stranger  
and puts them in, and then for the seisin, that shall be  
good



possessor of the Cornlands to have *affine*: so that he said, that the  
owing is not for purpose: also he said Horses will eat Akornes,  
as well as Cows: And he said they in the Country where he inhab-  
it being a Wood-land Country, they will not suffer the Beasts  
to go into the Woods at a certaine time of the yeare: and this is  
when Crabs are ripe, for then their Beasts will eat Crabs, and see  
their teeth an edge; and then not being able to chew Akornes  
do swallow them whole, and the whole Akornes being swallow-  
ed whole, will grow in the Mawe of the Beast, and to kill them.  
And he said that though that Horses be not so proper Beasts, to  
take feise of Paunge as Porses are, yet being put in for the same  
purpose, if they are disturbed that chat. *Solism* and *Dissolism*, and  
it seeme to him that when things are granted to one, that it shall  
not be strange to say, that feise of one shall be feise of both, and  
for that if a man grants all his arable Land, all his Meadow, and all  
his Wood, Livery and *Solism* in one feise for all, but I conceive  
that this is in respect of the soyle which passeth, and so are all of  
one self same nature, and so he conceives that this is sufficient *Solism*  
and *Dissolism* found to have *affine* *And* *solism* *And* *solism* *And* *solism*  
And lastly to the Title of the Earle of Rutland, he said that this  
was good, and to the Grants of the King he said two things are  
necessary in all Grants of the King, that is, a Record, and a cer-  
tainty: and when a record shall be necessary and when not, and he  
said that in all cases, when a common person makes a Lease for years  
or for life, and the reversion is conveyed to the King, or the King  
will make Estate to another, he shall not recite this Lease, for this  
not being of Record, the King cannot take notice of it, and so he  
shall not recite it: But in all cases when the King makes a Lease for  
life, or for years, and if he will make a Grant to another, he ought  
to recite the first Estate, because that is of Record: And Justice  
*Trotter* as I heard of those which were next unto him, put this  
case: That if the King grants a Lease for yeares rendring Rent,  
and after the King reciting the Lease grants that to another for  
years, or grants the reversion to another, and doth not recite the  
Rent which was reserved upon the first Lease, that this second  
Grant shall be void for the not recital: And the cheife Justice ci-  
ted one *Philippus* Case to be adjudged in the 2. of *Edw.* That  
where the King made a Lease for one and twenty yeares, and after  
termining the said Lease, grants the reversion to another, and before  
that the second *Letters Patents* were sealed, the first Lessee sur-  
rendered: And said that the second Grant was adjudged void, for  
the King intended to passe a reversion, and now he shall have a  
Possession, and all that which is said to be in case of Land: Now  
let us see how it shall be in case of office, and for that if a common

person hath an office in Fee; and grants absolute life; and after grants the same to the King; and the King will grant the same to another; there he ought to recite the common persons Grant; as well as if it had been his own Grant; for there is not properly a reversion of an office, as the Book cited by my Brother *Williams* sayd.

Secondly, if the office be recited in *E. 1.* and be not in *E. 2.* the Grant is void, as *Blanche Case* in the Lord *Dyer* 3. *E. 1.* 197. 47. And this sufficeth for recitall. Then for certainty of the Kings Grant, it is said in *2. R. 2.* it is said that the Grants of the King ought to be made in certaine, and for that where the King there Grants to *Sir John Spenser* that he shall not be Sheriff, this was void, for the incertainty of the place. But if the Grant had been of such a County, or such a County, the Grant should be good: Also there ought to be certainty of Estates, as it is in *2. H. 8.* Where the King gives Lands to one and his Heires Males, this is void for uncertainty of the Estate, then it is so averred in our case if there be not sufficient recitall and certainty, and to the recitall that is good without question, for she recites that she hath granted that to *Markham* for life, and *Markham* is yet alive, and so the recitall good: Then for the certainty he said, that the rule is, that if the certainty be declared by expresse words, or if the King may reduce that to a certainty, the Grant of the King shall not be defeated, and for that he cited the case of Information of *Mines Commoyns*. But if the King grant to me all *Mines* in the Land of *J. S.* There I shall have all *Mines* Royall, for the Law saith, the King cannot have other *Mynes* in the Soil of a Subject but *Mines* Royall, and so there the Law supplies the Grant, so that they be *Mines* Royall, though not expressed in the Grant in certaine, so he said in the principall case, that the Queen hath expressly recited, that she hath granted the Herbage and Pannage for life to *Markham*, and that *Markham* was yet alive, and after grants that to the Earle of *Rutland*, and doth not say when that shall begin; the Law saith that shall begin after the death of *Markham*, for before that it cannot begin: But if the Queen had exprest in the *Letters Patents*, that this shall begin forthwith, then this had been void, as the Lord *Gandy* said in *Alstonwoods Case*, 1. *Coke* fol. 51. And so he concluded the Title of the Earle of *Rutland* good: So he affirmed the Judgement in all: But *Williams* was very peremptory for the conceit of Pannage that it was not good Seisin: But after *Crooke* Justice recanted his opinion of that, and inso much that there were three which concluded for the reverting of the Judgement: And yet for every point there were three against two: It was doubted if this Judgement should be reversed or not: And they said that they would advise with

with the rest of the Judges, and that it was moved againe by  
Justice Nicholls in the next Trinity Terme, and the Judges and the  
those Judges would have the Judgements affirmed, but the  
Emper, and Councill, as he reversed; and note well this Precedent  
where Judgement was reversed; and yet for every point there were  
three Cases two, or four Cases one, see the first Judgement in  
the Common Bench in *St. Nicholas Case* 8. Jacobi afterwards.

*Termine Pasche 7. Jacobi, 1609. In the Kings Bench.*

### Trinity College Case.

**T**HE Case was this King Henry the eight Incorporated the  
Schollers of Trinity College in Cambridge by the name of Ma-  
sters, Fellowes, and Schollers: *Collegij Scholarum et Individuorum Tri-*  
*nitatis*, in the Town and University of Cambridge, and in the 6. Ed.  
6. They made a Lease by the name of Master, and Fellowes of  
Trinity Colledge in Cambridge, leaving out the University: And if  
this Lease were good or not was the question: And Telperton ar-  
gued that this was not a good Lease, and that for the misnaming of  
the Corporation: And to that he said, to every Corporation, two  
things were incident: That is, name and place: and if say of those  
sayland be not certainly recited in a Lease, the Lease shall not be  
good: And he conceived that this Corporation is founded upon  
two places, and that one of them: That is, the University is left  
out, and for that cause the Lease is nothing worth, for if a Cor-  
poration hath two names, one of them cannot be omitted, as it is  
in the first of *Mary Dyer* 96, 97. and 9. *Mary* 140. and 150. 11.  
*Eliz. Dyer* 278. 35. H. 6. 5. and 6. No more then when it consists  
of two places one of them may be left out: And for that, if they had  
been incorporated by the name of Master and Fellowes of Trinity  
Colledge in Norfolk and Suffolke in a Lease, they could not leave  
out Norfolk or Suffolke, but both the places ought to be incor-  
porated: And by him in the principall case, if the Lease had been made  
by the name of the Master and Fellowes of Trinity Colledge in the  
Town, and leave out the University of Cambridge, without ques-  
tion, this shall be void, so here this being impliedly omitted shall  
be as strong, as if it had been by expresse words excluded, so in  
the making of every Corporation, the intent of the Founder is to  
be considered, and for that it seemes the intent of the King in pla-  
cing that in both places, was first to erect a Colledge, and that to  
grace the Town, and then he hath placed them in the University,  
and this was for the instruction in good Arts and Learning, and so  
for these benefites they have of both these places, nor one nor the

Disnaming of  
a Corporation.



other may be left out: And if the King had been incorporated by the name of Master and Fellowes of Trinity Colledge in Cambridge, and in the Market place of Cambridge: There though that the Market place was parcell of the Town of Cambridge, yet it seemes to him, that this cannot be left out: for peradventure the Founder hath a special reason to place them there, that is, to have in things necessary for them more convenient them: Also where any stranger demands any possession of them in *Precipe Quod Reddat*, or such like, he ought to ensue them certainly and precisely: Then a *Forreine* where they depart with their possessions by their own Act, there they shall not be unknowne of their one names: And *Walter* of the inner Temple argued to the contrary, and he conceived that the Lease is good, and first he argued the ground which hath been taken of the other part, that is, that every corporation ought to be in a certain place, and he conceived that there is a certaine place in this place, that is, the Town of Cambridge: And to this that is said, that this Corporation is founded upon two places, he denied that all together, for no more then one material Body, may be but in one place *Simul and Semel*, no more may it be in a Body Corporate, which hath allwaies his resemblance to a Body naturall, and for that he denied the case, which hath been put of the other part, of *Norfolk and Suffolk*: And he cyted the opinion of the Lord *Peppham in Puttins Case*, in which the Lord *North* was interested, that a Corporation cannot be limited to a County, as *Probat Hamines* of such a County, or *Trinity Colledge* in such a County, but it ought to be restrained to some certaine place, or one County, or a Town: But admit that the Corporation may be founded upon two places, yet he saith that a University is not Locall, but Personall: And to this purpose he cyted two Records one in 48 *H. 3.* Which was this; King *H. 3.* Intending to keep a Parliament at *Oxford*, and knowing that the place was not sufficient to contain all those, which should be there assembled, and the Schollers together, sent his Writ which was directed to the Chancellor and University of *Oxford*, commanding them that they should remove the University to such a place, till the Parliament should be ended: And after he sent his Writ to them againe, which was directed to the Chancellor and University, by which he willed that they should returne againe, the Parliament being ended, by which Writ he conceived, that it appeares that the University was not Locall: And this for two reasons.

First in so much that this Writ was directed to the Chancellor and University, and every Writ is directed to a person and not to a place.

Secondly the Writ that he should move and remove the University,

ley, which is a thing impossible to do if it should be a place: The other Record was 49. Ed. 3. And this declares, that there was contention between the Schollers of *Cambridge* and the Townsmen there, and the Schollers went to *Northampton*, and there they made a Petition to the King, that they might erect a University, and the King sent his Writ to the Maior, commanding him that he would not suffer the Schollers to remaine there, and that he would there erect a University, which proves that a University may be erected at the Kings pleasure, and so cannot a place, then admitting that a Corporation may consist upon a place, yet the University not being a place, that shall not be any prejudice to omit it: And he cited a case which was adjudged as he said, in the 26. of *Eliz.* which was thus: The Deane and Canons of *Windsor* made a Lease for years by the name of Deane and Canons of new *Windsor*: And this was adjudged no variance, and the case of 5. Ed. 4. of the Abbot of Saint *Maries* in *York* which see there, and he said the Lord *Norths* Case was thus: That Christ Church in *Oxford* was incorporate by the name of Deane and Canons of Christ Church in *Oxford*: And they made a Feoffment by the name of the Deane and Canons of Christ Church in the University of *Oxford*, and adjudged a good Feoffment: And he said that in the argument of this case it was said by *Gaudy*, that if a corporation were made of *Dale*, and after *Dale* is made into a City, they may make a Lease by the name of a City of *Dale*, and the Lord *Popham* (as he said) put these cases: That is, that if a Corporation be founded of *Oxford*: And that they made a Lease by the name of, &c. In the Precincts of *Oxford*, this shall be a good Lease, yet a thing may be within the Precincts of another place, and not in the place, and in the 31. *Eliz.* was the case of one *Jermin* and *Wyllis*, that if a Corporation be made, by the name of Deane and Chapter of Saint *Maries* in *Excester* is good: But they agreed in this case as he said, that if it appeare that they cannot be intended alone, otherwise it should be, and he conceived in the principall case, that it is not necessarily that it should be intended the same place, and for that he conceived in all those cases that the Lease shall be good, and he said that there were neer two hundred Leases upon the same Title, for which, &c.

And after this it was argued in *Michaelmasse* Term 1609. 7. *Jacobi* by the Justices: And the opinion of *Crook* and *Williams* Justices was, that the Lease was good: But *Fenner* and *Yelverton* to the contrary, and *Flemming* cheif Justice argued that the Lease was not good, but he said this should not be absolutely his opinion, but moved a composition betwixt the parties: But insomuch that the matter was not compounded, in the same *Michaelmasse* Term, Judgement

Judgement was praised: And *Williams* Justice brought into the Court a decree out of the Court of Wards concerning the Case which is put in *7. Eliz. Dyer* and *1. Coke Porters Case*: And upon the decree appeares, that an Information being exhibited there against the Master and fellows of *Trinity Colledge in Cambridge* concerning certain Land they made Title to, by a Devise made to them, by the name of Master, Fellows and Schollers, of *Trinity Colledge in Cambridge*, and this Devise was made, four and five of *Phil. and Mary*, and the Decree recyted, that upon this were two great Doubts and Questions conceived.

First, If this Devise were good, and also by the Statute of *1. and 2. Phil. and Mary*, which inabled to devise to spirituell Corporations.

And the second point was, That where they were incorporated by the name of Master, Fellows and Schollars *De sancta and Individua Trinitate*, in the University and Town of *Cambridge*, if this devise made to them by the name of Master, Fellowes, and Schollers of *Trinity Colledge in Cambridge* was good, and the Decree rehearsed, that the opinion of all the Justices in *England* was.

First, That it was a good Devise within the Statute of *one and two Phillip and Mary*, as it is reported in the Booke before cited.

Secondly, That this was not such a mis-naming of the Corporation which made the Devise voyd, and *Williams* Justice produced this Record, as he sayd to fortify his opinion: And he conceived no difference between a Grant and a Devise, nor no difference when an Estate or conveyance made unto them, and conveyance made by them, and for that he cited the Case in the *19 H. 8. in Dyer*, where if a man devise Land to the Abbey of *Saint Peters*, where the foundation is *Saint Paul*, this is a voyd devise, and so in a grant. And *Crooke* Justice, to the same Intent. *Telverton* Justice to that Decree shewed by my Brother *Williams*, I conceive a great Difference.

*Telverton.*

*Fenner.*

*Flemming.*

First a Will and a grant, for in case of a Will, it sufficeth if they be described by a name, by which the Intent of the Devisor may be sufficiently known, and a man is intende to be *Inops consilij* at the time of the Devise made, and for that that he hath not any to instruct him of the precise name of the Corporation for which, &c. And *Fenner* Justice to the same intent, and if a man devise to one, and his Assignes, as it is a Fee-simple in case of a Devise, so it is not in grant, and so devise to one and his Children, is an Estate Tayl in case of Devise, but not in a grant: *Flemming* cheife Justice to the same intent, and to the Decree he sayd, that this is as good Law,



as ever he heard in his life, but yet he conceived also, that there is a great difference between a Grant and a Devise, as if a man devise to a Monke the Remainder over, this is a good remainder, so devise to one the Remainder over, and the particular Tenant refuse, this is good in a Devise, contrary in grant, and to the case which is put by my Brother *Williams* out of the 19 H. 8. *Dyer*, there is a great difference, where there is not any such person at all to take, there the Devise shall be void, as where the Devise to the Abbot of *Saint Peter*, where the foundation is of *Saint Paul*, and where it is a person certain, but all the name is not so precisely recyted, and to that which is sayd by my Brother *Williams*, that no difference between conveyance made to them and by them, I agree to him with this difference, that is, if conveyance be made to them, of what by presumption in Law they are knowing, and are parties as a Fine levied to them, and such like, but of a Devise it is not presumed, that they have knowledge of that till the Death of the Devisor, and he conceived that the Lease is voyd, and this Decree shewed, hath not changed his opinion, but he moved the parties again to an agreement, and would not as yet give Judgment.

*Hitcham* the Queens Attorney, moved the Court for a Prohibition, and the case was this, two Merchants covenanted by Deed with their Factor to allow him ten pound a Moneth for his Wages, and one Merchant sealed the Deed in *England* and the other sealed that upon the Sea, and the Factor came and sued the Merchants in the Admiralty for his wages, and by the Court inso much that one of them sealed it upon the Land, this is not any thing done upon the Deepe Sea, and for that Prohibition was granted to him.

Prohibition.

Upon a Motion made by *Wincolt* of the *Middle Temple* to dissolve a Prohibition granted to the Spirituall Court, upon a Libel for Tithes, there the Court took this rule, that when a Consultation is lawfully granted, there a new Prohibition shall not be granted upon the same Libell, and yet they qualified that with this difference, that is, when a Consultation is granted upon any fault of the Prohibition in form by the Misprision of the Clark, or by mis-pleading of any Statute in that, or such like, there a new Prohibition may be granted upon the same Libell, but if Consultation be granted upon the right of the thing in question, there a new Prohibition shall not be granted upon the same Libell, see the Statute of 5 Ed. 3.

Prohibition.

Pasch. 9. Jacobi 1609. In the Kings Bench.

**B** Romehead and Spencer Plaintiffs, Rogers Defendant, where an Action of Debt was brought by the Plaintiffs against the Defendant

dant as Administrator during the minority of one 7. 8. and the Plaintiffs shew in their count, that the said 7. 8. at the time of the Writ brought, was, and yet is within age of one and twenty years, and verdict passeth against the Defendant, and *Crews* moved in arrest of Judgment, that the Declaration was insufficient, for they have declared that the Executor was within the Age of one and twenty years, and the Administration during the nonage shall cease when the Infant comes to the Age of seventeen years, so that he may be of the age of 17. 18. 19. or 20. years; and yet the Administration ceaseth, and so of Action against Administrator, and so was the Opinion of all the Justices; and the Judgment was stayed upon that, according to the resolution of *Piggotts Case* 13. Coke 29. d.

*A married  
Wife cannot  
make a Letter  
of Attorney.*

**P** *Lomer* against *Hockhead*, the Plaintiff declares in *Ejectione firme*, upon a Lease made to him by three Husbands and their wives, and that the Defendant ejected him, and at the Issue upon not guilty, and in evidence to prove this Lease, and the delivery of that, was shewed a Letter of Attorney made by the Husbands and their wives, and the counsel of the Defendant takes exception to the Declaration, for they have declared upon a Lease by three Husbands, and their Wives, with a Letter of Attourney to make delivery, and a married Wife cannot make a Letter of Attorney. And so this is not a Lease of the Wives, and so the Plaintiff had declared upon no Lease. And the opinion of all the Court was, that a married Wife could not make a Letter of Attorney. And *Williams* Justice compared this to the case of an Infant, as if an Infant makes a Feoffment or a lease, and delivers that with his hand, this is not, but voidable: But if it be executed by Letter of Attorney, that is a disseisin to him, but by *Flimming and Williams*, if the Plaintiffs had declared upon a Lease made by the Husbands only; this had been very good.

*Replevin.*

*Thomas Malin* Plaintiff in *Replevin* against *Thomas Tully*, the case was; The Queen *Mary* was seised of a Park called *Esfnord* Park in her Demesne as of Fee as in Right of her Crown, and so being seised by her Letters Patents, let the said Park to two for their lives, and after died: And the Queen *Elizabeth* by her Letters Patents recyting the said Lease for lives, and that the said Lessees were alive, granted the said Park to *Humphrey Lord Stafford* and his Wife, and to the Heires of the said Lord *Stafford* of the Body of the said Wife lawfully begotten: And by the said Patent the same Queen by these words, *As de Ampliori et Uberiori Gracia, Nosstris Volumus et Declaramus, quod si Predictum Dominum Stafford, Solvat seu Solvi faciat prefato Domina Regina &c. ad talem Diem, Tunc concedi-*

*Concedimus, quod predictus Dominus Stafford habebit reversionem predictam sibi et Heredibus suis:* And the Lord Stafford paid the said sum of twenty shillings according to the said *Letters Patents*, and if he shall have Fee-simple or not was the question. And it was objected that he shall not have it, for the words of the Patent are; that if the Lord Stafford paies the money, *Tunc concedimus*, the which words seeme that the Grant shall take effect, *in futuro*, and it was not a present Grant, but when the money shall be paid then shew granted, but it seemes to the Justice, that it was a good Grant immediatly to take effect upon the payment of the money, and the condition was precedent, till that be performed the reversion remains in the Queen *Eliz.* And the Queen might grant by one selfe same Patent as by diverse: See 10. *Assise* 13. 7. *Ed.* 3. 8. *Ed.* 2. Feoffments, and that the reversion shall not extinguish the Estate Tayl, but they may well be together, but otherwise it is of an Estate for yeares or for life.

Warburton Justice, that the King is specially favoured in the Law, and for that he shall not be enforced to attend in case, as other persons ought to make attendance: And for that in case where a common person may make a good Grant, the King also may make a good Grant, and in the case at the Barr, if the Grant had been made by a common Person, it had been good without question: But the first objection that hath been made was, that where a man hath made a Lease for life or for years, upon condition to have Fee, there the particuler Estate shall be drowned upon the increasing of the Estate, but the Statute of *Westminster* 2. preserves the Estate tayl that it shall not be drowned, and that the Fee in this case doth not vest till the condition be performed, for if the Lessee for years or life, surrender before the performance of the condition, the Fee doth never increase, as it is 14. *H.* 8. 20. and the Lord *Chandos* Case, 6. *Coke*: But the Estate tayl remains after the condition performed, and then hath the Fee dependant upon the Estate tayl, and that there is a necessity that there shall be an office, as it was in *Nicholls* Case in the *Com.* because of the right and that after the condition performed then the Fee shall vest, *Ab Initio*, and this incorporates together partly by the Letters Patents, and partly by the performance of the condition, and so it is in *Butler and Bakers* case that it is not a Grant *in futuro*, but one immediate Grant to take effect *in futuro*, see 2. *H.* 7. for the execution of *Chantrey* and *Grondons* Case in the *Com.* and 2. *H.* 7. If the King grant Land to J. S. for life, the remainder to the right Heires of J. R. which is in life, the remainder is good, as well as in case of a common person, and so he seemed that Judgement shall be given for the Plaintiff.

Warburton Jus-  
tice.



Walmesley.

Walmesley Justice agreed, that it shall be remainder and not reversion, as if Lands begin to the Husband and the Wife and to the Heires of the Body of the Husband, the Husband dies, this is a remainder, in the Heires Male and not a reversion, for it cannot grow higher, and it was not in the King as one distinct Estate, before the Grant, and *Parvulus* in remainder lieth for it, and though it be misrecited yet it shall be good, and ayded by the Statute of Miseditelle, and grant of a thousand is suffered to convey the reversion of a thousand by the common Law; and if the recital were that it was a reversion depending upon the Estate sayl, it was good without question, and the King may grant five hundred reversion if he will; and that the last (*Damus*) is *ex certa scientia et mere motu nostris, Damus et concedimus*, that if the Patentee pay twenty shillings, *Tunc scietur, quod nos de ampliori gracia et certa scientia et mere motu, nostris concedimus*, &c. and that the word *Volunt* will amount to a Covenant or a Release, as 32. H. 6. The King by his Patent by these words (*Nolunt*) that he shall be impended, and this amounts to a release, and so words which imports expressly words of Covenant may be pleaded as a Grant in case of the King, as it is 23 Ed. 4. So if a common person license another to occupy his Land, this amounts to a Lease of Land if the time be expressed, so if a man grants to another that he shall have and enjoy his Land to him and his Heires, that by that Fee passeth: And if the King grant reversion to begin at Michaelmasse, the Grant is void, for that it is to begin totally at Michaelmasse, and doth not looke back to any precedent thing: But if it relate to any precedent Act, then that shall be good by relation, and shall passe *ad Patria*; see Com. Walsingham Case 333. b. that in such case the performance of the condition divests the Estate out of the King, and there is no difference in this case betwixt the King and a common person, and agreed in the case of *Littleton*: Where a man makes a Lease for yeares upon condition to have Fee, that the Fee shall not passe till the condition be performed, and with this agrees 2. R. 2. But if a man makes a Charter of Feoffment, upon condition, that if the Feoffee enjoy the Land peaceably for fifteen yeares, that the Feoffment shall be void: In this case the Fee-simple determineth by the performance of the Condition, and in this case the Fee passeth, *ad Patria*, by the Livery at in 10. Assise 18. Assise 1. 44. Assise 49. Assise. And he agreed that the words *Habeat et Tenet* the Reversion passeth, and this is good Fee-simple, and this refers to the first *Damus et Concedimus*, and so concluded that he seemed that Judgement shall be given for the Plaintiff.

Only cheife Justice accordingly, and he conceived that there are two questions upon the substance of the Grant.

And

And to the first objection, that hath been made, that is, that reversion was granted, and increase of an Estate cannot be of a reversion, and in all these cases which have been put they are of an Estate in possession, and so is the case of *Littleton* also, and he agreed that it shall not be good, if it be not good, *ab initio*, that though there be not other words then *Reversionem predictam*: That it shall be good.

And to the second point upon the former: He conceived that the Grant is but a Grant, and that the condition is but precedent limitation, when the Estate of Fee-simple shall begin, and so it is said by *Montague*, in *Colthurst and Brinskins* Case in the *Comm.* And further he saith that there are four things necessary for increasing an Estate.

First, that it ought to be an Estate, upon which the increasing Estate may increase.

Secondly, the particular Estate ought to continue, for otherwise it is grant of a reversion in *Future*.

Thirdly, That the Estate which is to increase ought to vest by the performance of the Condition, for if there be disturbance that it cannot then vest, then it can never vest.

Fourthly, that both the Estates as well the particular Estate as the Estate which is to increase ought to have their beginning by one self same Deed, or by diverse Deeds delivered at one self same time.

And to the first, and to prove that he cyted 44 *Ed. 3.* Attaint 22. Lessee for yeares upon condition to have Fee, grants his Estate, the Fee doth not increase upon the performance of the condition, for then it shall passe as a Reversion, and so the particular Tenant surrenders his Estate, as it is sayd 14. *H. 8.*

For if the Privy be destroyed the Fee will never increase, but there is no such nicety, but that if the substance of the Estate remains, though it doth not remain in such form, as it was at the first Reversion, the Estate may well increase, as if Lands be given to the Husband and wife and to the Heirs of the Husband, upon the Body of the Wife to be begotten, the Wife dies, and the Husband is Tenant after possibility of Issue extinct, yet he may well perform the condition, for the Estate remains in substance, and with this agrees, 20 *H. 6.* Ayd; and so it is if a Lease be made to two for yeares upon condition to have fee, one dies, the other may perform the Condition, and shall have Fee-simple, as it is agreed by 12. *Assise 5.* the reason is that the privy remaines and the Estate also in substance.

Thirdly, As to that also, it seems that it ought to vest upon the performance of the condition, which is the time limited for the beginning of the Estate, and if it do not vest then, it shall never vest, and if it do not vest without Office in this case, it shall never vest

at all, but it is for the Honour of the King, that his grant shall have his effect, and 49 Ed. 3. 16. *Isabell Goodcheape case*, she devised her Lands to her Executors to be sold, and dyes without Heir the King hath that by Escheat, yet the Executors may sell it, and for that divest the Estate out of the King, and so was the Lord Lovells Case, and the reason is for the necessity, for the Prerogative of the King shall do no wrong, and there need no continuance of the Estate of the part of the Lessor, but of the part of the Lessee, and for that if the Feoffor make a Feoffment, or grant his Estate, this shall not make prejudice or alteration of the Estate, and for that if the King refuse to receive the Money, yet if it be tendered the Fee-simple shall vest in the Patentee, and the simple upon that shall increase, see 31 Ed. 1. Feoffments and Deeds B. 32. *Quid Juris Glamar* be.

And to the fourth it seems also, that both the Estates ought to be created and granted by one self same Deed, or by divers delivered at one time, *Quia qua in continenti sunt pro uno habentur & reputantur*, as if a man makes a Lease for years upon Condition to have in rayl, upon condition to have in Fee, this second condition is void, for it ought to be all one Grant, and cannot be intire, upon the privy of the first grant, and it is not material though that the first Estate be drowned upon the performance of the condition, as if the King makes a Lease for life, the Remainder in rayl upon condition, that if the Tenant for life pay twenty shillings, that he shall have Fee, this shall be a good Grant, and the Fee well vested by the performance of the condition, though that the particular Estate for life shall not be drowned.

And to the second point, that is, that the Grant of the King shall not be good, for that that it is by the words Reversion aforesaid, he agreed that if the King makes a Grant to one intent, that shall not enure to another intent: But this shall enure to the intent for which it is made, *Ut res magis valeat et quam periat*, and it is for the dishonor of the King, to make an unconscionable Grant. And to the Objection which is made, that the King is not understanding of Law, to that he answered, that the King is (*Caput Legis*) and for that shall not be intended to be ignorant of it, and for that if a grant may have two intendments, one to make the Grant good, the other to make the Grant voyd, it shall be intended, and expounded in the better sense, that is, to make the Grant Good, and not to make the Grant voyd, for this was *Iniqua expositio*, and also he sayd that the Grant shall be good for the first word (*Concedo*) though it had not been subsequent also, as if a man grant a Rent charge, and if it be behinde, that the Grantee may distrain for the first Grant, and the Grant is not of a Reversion *In futuro*, but grant that



that if the condition be performed that then the Fee doth passe *in fe-  
rre*, and it seemed to him, that it was a good devise so prevent  
that the Estate taylor should not be discontinued by Fine nor other-  
wise, untill the Condition were performed, and so of recovery al-  
so; for if the King grant an Estate taylor, and after grants the Rever-  
sion in taylor, this second intaylor is within the intent of the Statute,  
and when the Issue of the first Tenant in taylor shall not be barred, the  
Estate of the Tenant in taylor in Remainder shall not be barred, see  
the Lord *Barkleys case in the Com. fol* and 7 *Ed. 4.* and  
as to the pleading he sayd, that when the Issue is offered, which de-  
pends upon matter in Law, there is no necessity to take travers upon  
the matter in Law, for it doth not belong to lay men to decide the  
matter in Law, and for that he concludes, that the Grant in sub-  
stance is good, and in form exquiesce, and that the Issue in taylor in  
Reversion shall not be barred, for *Quod non in principio valet, non  
valebit in accessario*, and that Judgment ought to be for the Plaintiff,  
which was done accordingly.

**I**N *Ejectione firme* against *Gallop*, after Verdict and Judgment for  
the Plaintiff a Writ of *Habeas facias Possessionem* was awarded and  
executed, and returned and fyled, and after the same Defendant  
re-entred and oured the Plaintiff, and Attachment was awarded,  
and it seems that if the Writ had not been returned, that then a  
new Writ shall be awarded, and the Attachment was awarded upon  
*Assiduis*.

Re-entry after  
possession exor-  
cised.

**I**N Action upon the case against *Trotman*, the words were, Thou  
sayest thou art an Attorney, but I think thou art no Attorney, but  
an Attorneys Clark in some Office, but if thou be an Attorney I will  
have thee pickt over the Barr the next Tearme, and thy Eares  
nailed to the Pillory, and it seems that these words are not Actiona-  
ble.

Slander of  
Attorney.

**I**N waging of Law of Summons in Dower, *In petit Cape*, there  
ought to be two summons only, and if it be Grand Cape, then there  
ought to be two Summoners and two Viewers, and Summons upon  
the Land is sufficient to give notice of the Demandant, of the thing  
demanded, and the day in Court. That in Waging Law, the  
Lord *Coke* sayd, that the Defendant himself ought to swear, *De  
fidelitate*, and eleven others, which are named in the Statute of  
*Magna Charta, chapter* *Testes fideles* ought to swear *De creduli-  
tate*.

Grand Cape  
P. lit Cape.

Waging Law.

Release.

**I**F Tenant for life be the Remainder in Tayl to another; the Remainder in Fee to the Tenant for life, and the Tenant for life released to the Tenant in Tayl, the Release is good to passe the Remainder in Fee to the Tenant in Tayl, for to this purpose the Tenant in Tayl hath sufficient possession, upon which the Release may enure, but it shall not be good to pass the Estate for life, and 19 H. 6. and 9 H. 7. If Tenant in Tayl in Remainder, Disseise Tenant for life, he doth not gain Fee-simple by *Fuillbury*, but if there be Grand-Father, Father, and Son, and the Father makes a Feoffment the Grand-Father dies, the Father dies, the Son is barred, so if the Son had levied a Fine being Tenant in Tayl, 33 and 39 H. 6. 43. a. 21 Ed. 4. Discontinuance.

*Pasch. 7 Jacobi, 1609. In the Common Bench.*

Warbrooke and Griffin.

Inn-Keeper in  
London.

**B**ETWEEN Warbrooke and Griffin, a Guest brought a Horse into an Inn in London to be kept, the which stayed there so long, till he had eaten out his Worth, and then the Inn-Keeper caused the said Horse to be pryed, and then sold him according to the custome of London, and it seems well he might do it, and that the Sale was lawfull for the Inn-Keeper, as to the Person of his Guest ought to receive him, and he is compellable to do it, as it is 5 Ed. 4. 2. and 22 Ed. 4. And for his Goods he ought to keep them safe, and of the other part the Guest ought to pay the Inn-Keeper, as well for the meat of his Horse as for his own, as it is 28 H. 6. And it should be inconvenient that he should be put to his Action for, &c. And for preventing this mischeife, the Inn-keeper may detain the Horse of his Guest, till he be satisfied, and it seems to Coke cheife Justice, that an Inn-Keeper is not chargeable with the Goods of any, which is not lodged in the Inn, and the Goods must be lost by default of the Inn-Keeper, and that the Inn-Keeper is not compellable to receive the Horse of any, if the Master be not lodged, and if a Neighbour of the Inn-Keeper come to the Inn-Keeper he shall not answer for the Goods, for he is not lodged, but as a Tipler, and so if an Inn-Keeper invite any to his House *Ad Prandendum aut Canandum*, the Inn-Keeper shall not be charged, as it is 35 H. 8. For it was agreed that the Guest ought to averr that he was lodged in the Inn. And Foster Justice sayd, that it was adjudged in the case of one *Perin of the Black Swan in Holborne*, that by the custome of London, an Inn-Keeper may sell a Horse which remains with him to be Kept, and hath eaten more then he is Worth, and so it was sayd by Foster, that where a Haberdasher of

of London came to an Inn, and there sold divers Hatts, and after went to a Faire, and left divers other Hatts in the Inn: the which in his absence were stolen; and the Inn-Keeper should not answer for them, for that that the Haberdasher was not lodged in the Inn at that time; and this was the Case of one *Chay* in the 15 of *Eliz.* But Sir *Edwin Sande* lodged in an Inn and there lost a Trunk, and went to meet the King, the Trunk remaining in the Inn, in his absence it was stolen, and the Inn-Keeper was charged, *Quare* the Difference, if the Owner desire that his horse should go to grass, the Inn-Keeper shall not answer, but if an Inn-Keeper receive the horse, and of his own head put the horse to grass, and he is stold, there the Inn-Keeper shall be charged; and though the Inn-Keeper deliver the Key of the Chamber to the Guest, yet the Inn-Keeper shall answer for the goods which are stolen, for it is an implied promise of every part, that is, of the part of the Inn-Keeper, that he will preserve the Goods of his Guest, and of the part of the Guest, that he will pay all duties and charges, which he caused in the house; and that the Inn-Keeper may retain (without custom, by the Common Law) the Horse of the Guest as a pledge till he be satisfied of all dues, and so a Tayler, and Goods taken in *Wiburnum*, But the Inn-Keeper cannot work the horse of his Guest in such a case, nor sell his Goods though that they be *Bona parvi*.

Trinity 7. Jacobi, 1609. In the Common Bench.

Colledge of Physicians Case.

**THOMAS Bingham** brought an Action of false Imprisonment against Doctor *Alkins* and divers other Doctors of Physicke: The Defendants justified, that King *H. 8.* Anno Decimo of his Reigne, founded a Colledge of Physitians, and pleaded the *Letters Patents* of their Corporation: And that they have Authority by that to chose a President, &c. as by the *Letters Patents*, &c. and then pleads the Statute of 31 *H. 8.* chapt. 40. And that the said Doctor *Alkins* was chosen President, according to the said Act and *Letters Patents*, and where by the said Act and *Letters Patents* it is provided, that none shall practise in the City of London or the Suburbs of that, or within seven miles of the said City, or exercise the faculty of Physicke, if he be not so that admitted by the Letters of the President and Colledge, sealed with their common Seale, under the penalty of a hundred shillings, for every Month (that he not being admitted) shall exercise the said faculty, further we will and grant for us and our Successors, that by the President and Colledge

Action of false Imprisonment.



Colledge of the Society for the teaching, and for their Successors for ever, that they may those foule every yeare, that shall have the overseeing, and searching, correcting, and governing, of all in the said City being Physicians, using the faculty of Medecines in the said City, and other Physicians abroad whatsoever using the faculty of Physicking by any meane frequenting and using, within the City or Suburbs thereof, or within seven miles in compasse of the said City, and of punishing them for the said offences, in not well executing, making, and using that: And that the punishment of those Physicians using the said faculty, so in the premisses offending, by Fines, Amercements, Imprisonments of their Bodies, and by other reasonable and fitting waies shall be executed: Note the preamble of these Letters Patents is, *Quod cum Egregij officij nostri munus arbitremur, ditioris nostre, Hominum felicitati omni ratione Consulere: Id autem vel imprimis fore, si improborum conaminibus tempestive occurramus, apprime necessarium fore duximus, improborum quosque hominum, qui medicinam Magis uicaria sua causa, quam ullius bonae conscientia fiducia praeestabuntur mundi Rudi et credula plebi plurima incommoda oriuntur, audaciam comperere.* And that the Plaintiff practised in London, without admission of the Colledge, and being Summoned to appeare at the Colledge, and examined if he would give satisfaction to the Colledge according to the said Letters Patents and Statute, he answered that he had received his decree to be Doctor of Physick by the University of Cambridge, and was allowed by the University to practise, and confessed that he had practised within the said City, and as he conceived, it was lawfull for him to practise there, that upon that the said President and Commonalty fined him to a hundred shillings, and for not paying of that and his other contempts, committed him to Prison, to which the Plaintiff replied as aforesaid, and upon this demurrer was joyned: And Harris for the Defendant, saith, that this hath been at another time adjudged in the Kings Bench, where the said Colledge imposed a Fine of five pound upon a Doctor of Physick which practised in London without their admission, and for the non payment of that, brought an Action of Debt, and adjudged that it lay well, and that the Statute of 32. H. 8. extends as well to Graduates, as to others, for it is generall, and Graduates are not excepted in the Statute, nor in the Letters Patents, and all the mischeifes, intended to be redressed by this, are not expressed in that, and the Statute shall not be intended to punish Imposters only, but all other which practise without examination and admittance, for two things are necessary to Physicians, that is, learning and experience, and upon that there is the proverb, *Experto credo Roberto.* And the Statute intends that none shall practise here but

Serjeant Harris the younger.

but those which are most learned and expert, more then ordinary: And for that the *Statute* provides, that none shall practise here without allowance and examination by the Bishop of *London* and the Deane of *Pauls*, and four learned Doctors: But in other places the examination is referred only to the Bishop of the Diocese, and the reason of the difference is, for that, that *London* is the hart of the Kingdome: And here the King and his Court, the Magistrates and Judges of the Law, and other Magistrates are resident, and with this agreed the government of other well governed Cities in *Italy* and other Nations, as it appeares by the preamble of the said *Letters Patents*: and it appeares by the *Statute*, that this was not intended to extend to Imposters only, for that that the word Imposter is not mentioned in the *Statute*: And the *Statute* provides that they shall be punished, as well for doing and using, as for ill using: And also it is provided that the *Statute* of 1: *Marie* 1. Parliament, chap. 9. That the Gardians, Goalers, or Keepers of the Wardes, Goales, and Prisons within the City and precinct of that, shall receive into his Prison all such person and persons so offending which are sent or committed to them, and those safely shall keep without Bayl, till the party so committed, shall be discharged by the said President, or other person by the said Colledge to that authorised, by which it appeares, that the Goalers, Keepers of Prisons, have power to retain such which are committed: That then the President shall have power to commit, for things Implied are as strong as things Expressed; as it appeares by the *Com. Stradlinge and Morgans Case*: And also in the Earle of *Leicesters Case*, where it is agreed, that Joynture before Coverture cannot be waved, and this is implied within the *Statute* of 27. *H. 8.* And so the *Statute* of 2. *Ed. 6.* Provides that after seven yeares Tythes shall be payd, by which it is Collected by Implication, that during seven yeares, Tythes shall not be payd; and so he prayed Judgement for the Defendants.

*Dodridge* Serjeant of the King, for the Plaintiff said, that the *Statute* of 24 *H. 8.* chap. 5. and the *Letters Patents* gives power to four Censors to punish for ill executing, doing, and using the faculty of a Phisician, and the Plaintiff was not charged for ill executing of it, doing or using: But it is averred, where *Revera* the Plaintiff was nothing sufficient to exercise the said Art, and being examined, lesse apt to answer, and thereupon they forbade him, and being sent for and not appearing, was amerced five pound, and order that he should be Arrested, and being Arrested, upon his appearance, being examined if he would submit himselfe to the said Colledge, he answered and confessed, that he had practised within the said City, being a Doctor of physick as aforesaid, as well

to him it was lawfull, and that he would practise here againe, for which he was committed to Prison: So that he was amerced for his contempt in the using of the said Art, and committed to Prison for his answer upon his examination: And he conceived that there are two questions considerable.

First, If the Colledge may restraine a Doctor of phisick of his practise in *London*.

Secondly, admitting that they may, then if these are the causes for which they may commit by their *Letters Patents*, the first reason is drawn from the *Letters Patents*, and the said *Statutes*, in which he said that the intent of the King was the end of his work: And this intent shall be expounded for three reasons apparent in the words contained in the Grant.

First, *Intempestive Conatibus occurrere.*

Secondly, *Improbosum Huminum, qui medicinam Magis avaritia sua causa, quam aliam bona Conscientia fiducia profuebantur, audaciam Compescere.*

Thirdly, which would invite learned men to practise here, and for that would, *quod Collegium profectum Doctorum et graviorum virorum qui medicarent in urbe nostra Londono et suburbibus infra septem millia passuum in urbe quaque versant, publico Exerceant institui volumus et imparamus*: And further he said, that there are three sorts of men, which meddle with the Body of a man.

First, is the learned man which reads all Bookes extant, and his knowledge is speculative, and by that he knew the nature of all simples.

And the second is practive, the knowledge of which is only his experience, he may give *Probatum est*: But the ignorance of the cause of the disease, and the nature of the things which he applies for the cure of that.

And the third is an Imposter, which takes upon him the knowledge which he hath not, and every of them the Colledge may punish, for *Male intendi, faciendi vel exequendo*, by what way they will: And this was not the first care which was had, for in the 9. H. 5. was a private Act made for Phisicians, by which there is great regard to them which are learned and educated in the University: And for that the Act provides that they shall not be prejudicall to any of the Universities of *Oxford* and *Cambridge*, and with this agrees 3. H. 8. 11. and the privileges of them, and the *Docti et graves homines*, mentioned in the *Letters Patents*, are the learned men mentioned in the Act, for the *Statute* provides that they shall punish according to these *Statutes*, and late edicts: And by the former Lawes the Universities, that their privileges were excepted, and by their former *Statutes*, the *Letters Patents* ought



ought to be directed, for it is referred to them: Also the *Statutes* of this Realme have alwaies had great respect to the Graduates of the Universities, and it is not without cause, for *Suavis et Alis*, and hath no other reward but this degree which is Doctor, and for that the *Statute* of 21. H. 3. prefers Graduates, and provides that Doctors of Divinity or Batchelors shall be capable of two Benefices with Cure without dispensation: And so 13. *Eliz.* provides that none shall be presented to a Benefice above the value of thirty pound *per annum*, if he be not a Doctor or Batchelor of Divinity: And to the objection, that none shall practise in *London* or seven miles circute of it without licence, that this clause shall be expounded according to the matter, and to that he agreed, for the other branches of the *Statute* are made to cherish grave and learned men, and for that it shall not be intended, that this branch was made for the punishment of those, but of others which the *Statute* intended to punish.

And to the second objection, that every Doctor is not the learned and grave man intended within the *Statute*, for the knowledge of many of them is only speculative without practise, to that he answered, that all their Study is practise, and that if they have no practise of themselves, then they attend upon others which practise, and apply themselves to know the nature of Simples.

And to third objection, that in *London* ought to be choyce men, for the Statute appoints that they shall be examined by the Bishop and Deane and four others at least, and for that there is a more strict course for them, then in other places, to that it is agreed: But he said that in the University there is a more strict course then this, for here he ought to be publickly approved by many after that he hath been examined and answered in the Schooles, to diverse questions, and allowed by the Congregation house: And 35. H. 6. 55. Doctor is no addition, but a degree, (*quia gradum et progressionem Doctrinae provenit*, to that, and that Doctor is teacher, and that he was first taught by others as Scholers, afterwards he is Master, and *Doctor dicitur a docendo, quia docere permittitur*, and they are called Masters of their faculty, and that the Originall of Doctor came of the Sinagogue of *Jewes*, where there were Doctors of Law; and it appears that they had their ceremonies in time of H. 1. And when a man brings with him the Ensigne of Doctrine, there is no reason that he should be examined againe, for then if they will not allow of him, he shall not be allowed, though he be a learned and grave man, and it was not the intent of the King to make a *Monopoly* of this practise.

And to the second point that he propounded, it seemes that

the Justification is not good, which is, *Quia non compervit*, upon Summons, he was amerced, and ordered that he shall be arrested, and being arrested, being examined if he would submit himself to the Colledge, he answered that he was a Doctor, and had practised and would practise within the sayd City, as he conceived he might lawfully do, and for that shewing of this case he was committed to prison, and he conceived two things upon the Charter.

Walmesley.

First, That it doth not inhibit a Doctor to practise, but punisheth him for ill using, exercising, and making, and may imprison the Emperick and Imposter, and so prayed Judgment for the Plaintiff, and after in *Hillary* Term, in the same year, this case was argued by all the Justices of the Common Bench, and at two severall dayes, and the first day it was argued by *Foster*, *Daniell*, and *Warburton* Justices, at whose Arguments I was not present, but *Foster* argued against the Plaintiff, and *Daniell* and *Warburton* with him, and that the Action of false imprisonment was well maintainable. And the second day the same case was argued again by *Walmesley* Justice, and *Coke* cheife Justice, and *Walmesley* argued as followeth, that is, that the Statute of 3 H. 8. was in the negative, that no person within the City of *London* or seven Miles of that, take upon him to exercise or occupy, as Physician or Chirurgion, &c. And he doth not know in any case where the words of the Statute are negative, that they admit any Interpretation against that but one only, and that is the Statute of *Marlebridge* chapter 4. Which provides that no Lord shall distrain in one County, and the beasts distrayned drive into another County, in which case though that the words are negative, yet if the Lord distrain in one County, he may drive the Beasts to his Mannor in another County, of which the Lands, in which the distresse was taken were held, but it is equity and reason in this case, that the Statute should admit such exception, for it is not of malice, but for that, that the Beasts may remain within his Fee, but in the principall case there is not the like reason nor Equity, And also the King H. 8. in his Letters Patents recites as followeth, that is, *Cum Regij officij nostri munus arbitremur, disionis nostri hominum felicitati omni ratione consulere, id autem vel imprimis fore, si Improborum conatibus tempestive occurremus, appropinquant magis avaritie sue causa quam ullius bone conscientie fiducia profitebatur, &c.* By which it appears, that it is the Office of a King to survey his Subjects, and he is as a Physician to cure their Maladies, and to remove Leprosies amongst them, and also to remove all fumes and smells, which may offend or be prejudiciall to their health, as it appears by the severall Writs in these severall cases provided, and so if a man be not right in his Wits, the King

is to have the Protection and Government of him, least he being infirme, wast, or consume his Lands or Goods, and it is not sufficient for him that his Subjects live, but that they should live happily, and discharges not his Office, if his Subjects live a life, but if they live and flourish, and he hath care as well of their Bodies as of their Lands and Goods, for Health for the Body is as necessary, as vertue to the minde, and the King *H. 8.* to express his extraordinary care of his Subjects made the said Act, in the third year of his Reigne, which was the beginning of his Essence, to that purpose, and by the Common Law, any Phisitian which was allowed by the University might practise and exercise the sayd faculty within any place within *England*, without any dispensation, examination, or approbation of any, but after the making of the sayd Act made in the third year of King *H. 8.* none may practise, exercise, or occupy as Phisitian or Surgion within the City of *London* and seven miles of that, if he be not first examined, approved, and admitted by the Bishop of *London*, and the Dean of *Pauls* for the time being, calling to them, foure Doctors of Phisick or Chirurgions, &c. And that no practiser may occupy or exercise the sayd faculty out of the sayd Precincts, if he be not first examined, approved, and admitted by the Bishop of the Diocess, or in his absence, by his Vicar generall, every of them calling unto him such expert persons in the said faculty, as their discretions thinks convenient, and the reason of this difference as he conceived, was for that that in this City, and the sayd Precincts, the King and all his Councell, and all the Judges and Sages of the Law, and divers other men of qualiry and condition, live and continue, and also the place is more subject unto Infection, and the Heir more pestiferous, and for that there is more necessity, that greater Care, diligence, and examination be made of those which practised here in *London* and the precincts aforesayd, then of those which practise in other places of the Realm, for in other places the People have better aire, and use more exercise, and are not so subject to Infection, and for that there is no cause that such care should be used for them, for they are not in such danger, and in the Statute there is not any exception of the Universities nor of those which are Gradiats there, and for that they shall be tryed by the sayd Act, and the Statute of 14 *H. 8.* chapter 5. Only excepts those which are Gradiats of *Oxford* or *Cambridge* which have accomplished all things for the form without any Grace, and if this Exception shall be intended to extend to others, then all the University shall be excepted by that, and such exception was too generall; and over he sayd, that the Plaintiff gave absurd and contemptuous answer, when he being cyted before them, sayd that he would not be ruled nor directed by them ( being such grave and



and learned men, & for that that he hath practised against the Statute he was worthily punished and committed, for it should be a vain Law if it did not provide punishment for them that offend against that, and *Bracton* saith, *Nihil est habere Leges, si non sit unus qui potest Leges tueri*, and for this here are four grave and discreet men to defend and mainrain the Law, and to punish all Offenders against that, according to the Statute, by Imprisonment of their Bodies and other reasonable wayes, and the sayd four men have the search as well of those men, as of other Mediciniers, and the Statute of *1 Marie* provides that the Keepers of Prisons, shall receive all which committed by the sayd four grave and learned men, and though there be great care committed to them by the sayd Statute, and the sayd Letters Patents, yet there is a greater trust reposed in them then this, for we commit to them our lives, when we receive Physick of them, and that not without cause, for they are men of Gravity, learning, and Discretion, and for that they have power to make Lawes, which is the Office of the Parliament, for those which are so learned may be trusted with any thing, and for the better making of these they have power to assemble all the Commons of their Corporation, and the King allows of that by his Letters Patents, for it is made by a Congregation of Wise, learned, and discreet men, and the Statute of *1 Marie* inflicts punishment upon Contempts, and not for any other offences, and they held a Court, and so may commit as every other Court may for a contempt of common right, without act of Parliament, or Information, or other legall form of proceeding upon that, as it appears by *7 H. 6.* for a contempt committed in a Leet, the Steward committed the Offender to Prison, and it was absurd to conceive that the Statute will allow of commitment without cause, and it is a marvelous thing that when good Lawes shall be made for our health and Wealth also, yet wee will so pinch upon them, that wee will not be tryed by men of experience, practise, and Learning, but by the University, where a man may have his Degree by grace without merit, and so for these reasons he concluded that this Action is not maintainable.

Coke.

*Coke* cheife sayd, that the Cause which was pleaded for, that the Plaintiff was committed, was for that that he had exercised Physick within the City of *London* by the space of a Moneth, and did not very fully answer, for which it was ordained by the Censors that he should pay a hundred shillings, and that he should forbear his practise, and that he did not forbear, and then being warned of that, and upon that being summoned to appear did not appear, and for that it was ordayned, that he should be arrested, and that after he was summoned again; and then he appeared, and denyed to pay the hundred

hundred shillings, and he sayd that he would practise, for he was a Doctor of Cambridge, and upon that it was ordained that he should be committed, till he should be delivered by the Doctors of the Colledge, and upon this was the Demurrer joyned, and in pleading the Plaintiff sayd, that he was a Doctor of Philosophy and Physick, upon which the Lord took occasion to remember a saying of *Galen*, that is, *Ubi Philosophia desinit, ibi medicina incipit*, and he sayd the only question of this case depends not upon the payment of the sayd hundred shillings, but upon the words of the Letters patents of the King, and the said two Statutes, the words of which are, *Concessimus eidem presidenti, &c. Quod nemo in dicta Civitate, aut per septem milliaria in circumsa ejusdem exerceat dictam facultatem, nisi ad hoc, per dictam presidentem & communiatem seu successores, eorum qui pro tempore fuerint, admissus sit, per ejusdem presidentis & Collegii litteras sigilla suo communis sigillatim sub pena centum solidorum pro quolibet mense quo non admissi eandem facultatem exercent, dimidium nobis, & heredibus nostris & dimidium dicto presidenti & Collegio applicandum, & preterea volumus & concedimus pro nobis, &c. Quod per presidentem & Collegium communicationem pro temporis presentium, & eorum successores in perpetuum, quatuor singulis annis per ipsas eligantur, qui habeant superiusum, scrutinium, & correctionem & gubernationem omnium & singulorum dicta Civitatis medicorum utentium facultate, medicina in eadem Civitate, ac aliorum medicorum, surnificorum quarumcunque facultatem illam medicina, aliquo modo frequentantiam & utentiam infra eandem civitatem & suburbia ejusdem sibi septem milliaria in circumsa ejusdem Civitatis ac parationem eorundem pro delictis suis, in non bene exequenda, facienda & atenda illa, nec non superiusum & scrutinium hujusmodi medicorum & eorum receptionem, per predictas medicas sive aliquem eorum hujusmodi legis nostris pro eorum Infirmis curandis & suavandis, Audis imponendum & atendis quasies & quando opus fuerit, pro modo & utilitate eorundem legiorum nostrorum, Ita quod poenitio hujusmodi medicorum utentium dicta facultate medicina sic in premissis de linquentium, per Fines Amerciamenta, Imprisonamenta corporum suorum & per alias vias rationabiles & Congruas exequantur, as it appears in *Rassal Physicians* 8018. 393. So that there are two distinct Clauses.*

The first, if any exercise the sayd Faculty by the space of a Moneth without admission by the President, &c. shall forfeit a hundred shillings for every Moneth be that good or ill, it is not materiall, the time is here only materiall, for if he exercise that for such a time, he shall forfeit as aforesayd.

The second clause is, that the President, &c. shall have *Scrutinium Medicorum*, &c. & punitionem eorum pro delictis suis in non bene

*bene faciendo, utendo & exequendo, &c.* And for that the President and the Colledge may commit any delinquent to Prison: And this he concluded upon the words of the *Statute*, and he agreed with *Walmesley*, that the King hath had extraordinary care of the health of the Subjects. *Et Rex cessatur habere omnes Artis in semine pectoris*, and he hath here pursued the Course of the best Physicians, that is, *Removens & promovens*, *removens Improbos illos, qui nullis bona conscientie fiducia proficabantur & audaces, & promovens ad sanitatem*: And for that the Phisitian ought to be profound, grave, discrete, grounded in learning, and soundly Studied, and from him commeth the medicine, which is *removens & promovens*.

And it is an old rule, that a man ought to take care, that he do not commit his Soul to a young Divine, his Body to a young Phisitian, and his Goods or other Estate to a young Lawyer, for in *Juveni Theologo est Conscientie detrimentum in Juveni Legislatore si detrimentum et in Juveni Medico Cimitorii incrementum*, for in these cannot be the privity, discretion, and profound learning which is in the aged: And he denied that the Colledge of Phisitians is to be compared to the University, for it is subordinate to that, *Cambrigia est Academia nostre nobilissima totius Regni oculus, et sol ubi humanitas et doctrina simul fluant*: But he said, when he names *Cambridge* he doth not exclude *Oxford*, but placeth them in equall Rank: But he would allwaies name *Cambridge* first, for that was his Mother: And he saith that there is not any time, *Pro non bene faciendo, utendo et exequendo* for this, *non suscipit Minus et Minus*, for so a man may previously offend in one day, and for that in such a case, his punishment shall be by Fines, amercements. Imprisonments of their Bodies and other waies, &c. But if practise well, though it be not an offence against the *Letters Patents* and the *Statutes* yet the punishment shall be but pecuniary, and shall not be Imprisoned, for if he offend the Body of a man, it is reason that his Body shall be punished, for *Eodem modo quo quis delinquit, eodem punietur*, but if a grave and learned Doctor or other, come and practise well in *London* by the space of three weekes and then departs, he is not punishable by the said Colledge, though that they be without admition, for peradventure such a one is better acquainted with the nature and disposition of my Body, and for that more fit to cure any Malady in that then another which is admitted by the Colledge, and he said that it was absurd to punish such a one, for he may practise in such manner in despite of the Colledge, for all the Lords and Nobles of the Realme, which have their private Phisitians, which have acquaintance with their Bodies, repaire to this City, and to exclude those  
of



of using their advise, were a hard and absurd exposition, for the old verse is, *Corporis auxilium medico committit sodali*. And also he said that the said President and Colledge cannot commit any Physician, which exerciseth the said faculty without admision, for the space of a Month, nor bring their Action before themselves, nor levy that by any other way or meanes: But ought to have their Action or exhibit an Information upon the Statute, as it appears by the Book of Entries, for they ought to pursue their power which is given to them by the Statute, for otherwise the penalty being given, the one Moytie to them, and the other to the King, they shall be Judges in *Propria causa*, and shall be Summoners, Sheriffs, Judges, and parties also; which is absurd: for if the King grant to one by his *Letters Patents* under the great Seale, that he may hold Plea, although he be party, and if the King doth not appoint another Judge, then the Grantee which is party, the Grant is void, though that it be confirmed by Parliament, as it appeares by 8. H. 6. 44. Ed. 3. The Abbot of Readings Case, for it is said by *Herle* in 8. Ed. 3. 30. *Trigores Case*, that if any Statutes, are made against Law and Right, and so are these, which makes any man Judge in his own cause, and so in 27. H. 6. Fitz. Annuity 41. that the Statute of Carlisle will that the order of Cistercians and Augustines, which have Covent and Common Seale, that the Common Seale shall be in keeping of the Prior, which is under the Abbot, and four others which are the most Sages of the house, and that any Deed sealed with the Common Seale which is not so in keeping shall be void, and the opinion of the Court that this is a void Statute, for it is impertinent to be observed, being the Seale in their keeping, the Abbot cannot seale any thing with it, and when that it is in the hands of the Abbot, it is out of their keeping, *ipso facto*. And if the Statute shall be observed, every common Seale shall be defeated by one simple furnise, which cannot be tryed, and for that the Statute was adjudged void, and repugnant: And so the Statute of Gloucester which gives Cessavit after Cesser by two yeares to be brought by the Lessor himselfe, was a good and equitable Statute. But the Statute of Westminster 2. chap. 3. which gives Cessavit to the Heire for Cesser in time of his Ancestor, and that, that was Judged an unreasonable Statute in 33. Ed. 3. for that, that the Heire cannot have the arrerages due in the time of his Father, according to the Statute of Gloucester, and for that it shall be void: And also the Physitians of the Colledge, could not punish any by Fyne and also by Imprisonment, for no man ought to be twice punished for one offence, and the Statute of 1. Maria doth not give any power to them to commit for any offence which was no offence within the first

*Statutes*, and for that he ought not to be committed by the said *Statute of L. Maria*: But admitting that they may commit, yet they have mistaken it, for they demand the whole hundred Shillings, and one halfe of that belongs to the King: And also they ought to commit him forthwith, as well as Auditors which have Authority by Parliament, to commit him which is found in arrearages: But if he do not commit him forthwith, they cannot commit him afterward, as it appears by 27. H. 6. 9. So two Iustices of the peace may view a force and make a Record of that, and commit the offenders to Prison, but this ought to be in *Flagranti Oriente*: And if he do not commit those immediately upon the view, he cannot commit them afterwards, and the Physicians have no Court, but if they have, yet they ought to make a Record of their commitment, for so was every Court of Justice: But they have not made any Record of that: And Auditors and Iustices of Peace, ought to make Records, as it appears by the Book of Entries: So that admitting that they may commit, yet they ought to do it forthwith, but in this case they cannot commit till the party shall be delivered by them, for this is against Law and Justice, and no Subject may do it, but till he be delivered by due course of Law, for the commitment is not absolute, but the cause of that is traversable, and for that ought to justify for speciall cause, for if the Bishop returns that he refuses a Clerk, for that he is *Schismaticus, Incuratus*, this is not good, but they ought to retaine the particular matter: So that the Court may adjudge of that: Though it be a matter of Divinity and out of their Science, yet they by conference may be informed of it, and so of physick: And they cannot make any new Law, but such only which are for the better government of the old, and also he said plainly, that it appears by the *Statute of L. Maria*: That the former *Statutes* shall not be taken by equity, for by these the President and Commons have power to commit a Delinquent to Prison, and this shall be intended, if they shall be taken by equity, that every Goaler ought to receive him which is so committed: But when it is provided by *L. Maria*, specially that every Goaler shall receive such offenders: That by this appears, that the former *statute* shall not be taken by equity: And so he concluded, that Judgement shall be entred for the Plaintiff, which was done accordingly.

Trinity 7. Jacobi, 1609. In the Common Bench.

*Divided, c.*

IN Debt upon escape brought by John Gay an Attorney of the Common Bench, by an Attachment of priviledge against Sir George Reynell Kt. Deputy Marshall of the Prison of the Kings Bench, the Defendant

Defendant pleads his privilege, that is, that he was Deputy Marshall, and he ought not to be sued in other Court, then in the Kings Bench, according to the ancient Custome, and Jurisdiction of the said Court, upon which the Plaintiff demurred, and upon argument of both parties, it was adjudged that the Defendant should not have his Privilege, and the principall reason was, for that the Plaintiff was an Attorney, and ought to have his privilege in the Common Bench, and for that that this Court was first possessed of the Suit, it shall not be stayed, because of the Privilege of the Defendant in another Court, see 9 Ed. 4. 53. the last case, where it is agreed, that one of the Courts may send *Superfedeas* to another, for there it is agreed that if an Accountant in the Exchequer be sued in the Common Bench, he shall send *Superfedeas* to them to surcease, and if he be sued in the Kings Bench, these of the Exchequer will shew the Record that he is accountable, for they cannot make *Superfedeas* to the King, and the Plea is there held *Coram Rege*, &c. And he shall be dismissed, for he may be sued in the Exchequer; and also 10 Ed. 4. 4. 6. It appears that if one which hath cause to have privilege in the Common Bench sue an Attachment, as our case is, against a Clerk of the Kings Bench, such Writ shall not be allowed, for that that the Common Bench was first seized of the Plea, by their Plea, and the Privilege of the common Bench is as ancient as the Privilege of the Kings Bench, and one Court is as ancient as the other, for every of them is before time of memory, and it is by prescription.

Walmesley says, that the Possessory shall be preferred, *Quia mollior est conditio possidentis*, but he agreed that if the privilege of one Court be not so ancient as the other, then the most ancient shall be preferred, and it was agreed that though there be Difference in respect of parties, or though that the attendance of one be of more necessity then the other, as it was objected in this Case, that the Defendant ought to attend, otherwise he shall loose his office; so that it was answered, and resolved that the cause of the Suit in the Common Bench was voluntary, and the attendance of the Attorney or Clerk more necessary, then of the Defendant, for hee may exercise his Office by a Deputy, but a Clerk or an Attorney cannot, for their office is *Opus Laboris*, But the Office of the Defendant is only *Opus Labrum*; and he is to deal with *Gyves and Irons* and such like, so that in this Case the Office and place of a Clerk or Attorney is to be preferred before the Office of Marshall, but admitting that one Inferiour Officer of the Common Bench, which is to have his privilege sue a superiour Officer of the Kings Bench which is also to have his Privilege there, this shall not make any



difference: And so was the opinion of all the Court, and upon this Judgment was given that the Defendant should answer over.

Trinity 7. Jacobi 1609. in the Common Bench.

Assise.

View.

IN an Assise between William Rawson alias Chester Plaintiff, against Thomas Knight alias Range Gylesseant for the office of one of the Heralds called Chester, the Recognitors of the Assise had view at a Funerall at Westminster, where the Officer ought to attend, and it was objected that this was no good view, for it was not in any place certain, where the Recognitors may put the Demandant in Possession, and the Dissisin was alledged to be at Westminster at the sayd Funerall, and it seems that the view was good, but admitting that it were not good, it seems so Coke chief Justice, that the Assise in this case well lies without view, for the Office is universall, as the Office of the Clark of the Market, and an Assise for Tithes, and the Office of the Tenna Court, these are universall, and not annexed to any place, and for that an Assise well lies for them without view, but for an Office in the Common Bench, view may well be made in the Court, for the Court is alwaies held in a certain place, but for an Office in the Kings Bench, Quere, Inquit Coke, for this ought to follow the Court of the King by the Statute of Articuli Cleri, Chapter 2.

Coke.

Walmesley.

But Walmesley Justice, that this Court cannot be sitting in Clouds, but in some place or other, and for that the view ought to be here made, and then Coke sayd, by the same reason the Office of the Herald cannot be exercised in the Clouds, but at Funeralls, and by this the view ought to be made there also, but the Opinion of all the Court was, that the view was well made: the Tenant in Assise also challenged diverse of the Recognitors, for that they were of a former Jury upon the same question, and this was agreed to be a principall cause of challenge, but the Court would not allow of that without shewing the Record, but allowed that to be a cause of challenge for favour, and for that they were tryed by their Companions, being sworn to speak the Truth, and they were found to be indifferent, and for Seisin for the Demandant in the Assise, it was shewed that diverse Fees were due to the sayd Office, as seven pound for every day that he attended upon the Kings person, and for the Dubbing of every Knight, and that diverse of those Fees were received (and this office being litigious) were delivered to be detained in Deposito, and to be delivered to him which was Officer, and the plaintiff brought an Action by the name of Chester as Officer and recovered those Fees, and this was resolved good Seisin, and also that Seisin after the grant of the Office, and before the investing of the

Challenge.

the Patentee by the Marshall was good, for the Investing was but a ceremony, it was also resolved that where an office extends to all the parts of *England*, and that here an *Assise* doth not lie in any County, though that the disseisin were made in one County, but the *Assise* be brought for the profit of the office in one County and not for the office it selfe, 43. Ed. 3. Feoffments and Deeds: That by Grant of the profits of a Mill and Livery, the Mill it selfe passes, so that taking of the profits is disseisin of the office, also it was objected that the Demandant was no officer, for though that he hath a Patent of it, yet he was not Invested nor Installed in the office, which appears to the Marshall, and for that he was no Officer, and so hath no cause to have Action: And that this is an office which is incident and annexed to the office of Earle Marshall, and though that he be not Earle Marshall, yet there are Commissioners have his power and authority, and for that the Investing and Instalment of the Plaintiff in the said office appears to the said Commissioners; but it was resolved cleerely by all the Justices, that the Demandant was Officer by the Kings Grant, without any Installation or Investing, and that this without that, all the Fees and Profits of the office appertayning to him, and that the Investing and Installation, was but a ceremony, in the same manner as if the King hath a *Donative*, and gives that to another, the Donee shall be in actuall possession by the gift, without any Induction or other ceremony: But admitting that the office were annexed to the office of Earle Marshall, then it was agreed that the Commissioners cannot give it, as the cheife Justice of the Common Bench hath divers offices appertaining to his place, and he may dispose of them; But if he die, the King in time of vacancy, nor the most ancient Judges cannot give or dispose of any of them being void, as it appears by *Serrogates Case*, *Eliz.* *Dyer*: And so the cheife Justice is made, and allwaies hath been made by Patent, and so are the other Justices, and for that they cannot be made by Commissioners, and so the cheife Justice of *England*, hath all times been made by Writ, and for that cannot be made by Patent, nor by Commission: And so in the case at the Barr, though that the Commissioners have the power and authority of the Earle Marshall, yet they are not Earle Marshall, it was also objected that the Fees were not due to the Plaintiff, for that he did not attend: But to that it was answered and resolved, that the Fees were due to the office, and for that non attendance of the office, was no forfeiture of the Fees: And upon these resolutions the Recognitors found for the Demandant, according to the direction of the Court.

Trinity 7. Jacobi, 1609. In the Kings Bench.

Godfall.

Error in a  
Fine.

**G**ODSALL and his Wife: The Proclamations of the Fyne were well and duly entered in the Originall remaining with the *Chirographer*: But in the *Transcript* with the *Custos brevium* was error, and it seemeth that this notwithstanding the Fyne was good, but the *Transcript* was amended.

Trinity 7. Jacobi, 1609. In the Kings Bench

The Town of Barwicke.

Barwick.  
Returne of  
Writts.

**T**HE King which now is, by his *Letters Patents*, Incorporated the Mayor, Bayliffs, and Burgesles of *Barwicke*, and granted to them the execution of the Returne of all Writts: And after a Writ of *Extendi facias* was directed to them, and they made no returne of that, and upon this was the question, if that shall be executed by them, or by the Sheriff of *Northumberland*: And it seemed to *Nicholls* Serjeant, that argued for the Plaintiff in the extent that desired execution and the returne of that, that they ought to make execution and returne, for it seemes to him that this was English, and that this appeares by the Act of Parliament, by which the Incorporation was confirmed, and so it appeares also by the *Letters Patents* of the King, by which the Incorporation is made, for if it were not English, neither the *Letters Patents* nor the Act of Parliament are sufficient to make Incorporation of that, and also they certified Burgesles to the Parliament of *England*: And the Kings Bench sent *Habeas Corpus* to it, and for the not returne of that inflicted a Fyne upon the Corporation: See 21. *Ed.* 3. 49, and 1. *Ed.* 4. 10. But *Hutton* Serjeant seemed to the contrary, and that they ought not to make execution, for he said it is a part of *Scotland*, and not part of *England*, and it was conquered from that, and it was a *Sherifsmicke*, and hath the same privileges of ancient times, which they now have by their new Grant: See 24. *Ed.* 1. and 2. *Ed.* 2. *Obligation*, &c. That one Obligation dated there shall not be tryed in *England*, and also that it is not within the County of *Northumberland*, nor part of it, nor the Sheriff of *Northumberland* cannot meddle in it, see 2. *H.* 7. 31. 26. *H.* 6. 23. and it is adjourned.

Idempritas no-  
minis.

It seemes that *Jacob* and *James* are all one name, for *Jacobus* is-  
Latine



Latine for them both, but *Walsley* conceived that if he be Christened *Jacob*, otherwise it is, as if one be Christened *Jacob*, and another *James*, then they are not one selfe same name.

Note that *Coke* cheife Justices said, that if Commissioners by force of *Dedimus potestatem*, take a Fine of an Infant, that they are Fynable and ranfomable to the value of their Lands, and that this shall be sued in the Star-chamber.

Fine.  
Infant,

Trinity 7. Jacobi, 1609 In the Common Bench.

Robinson.

**R**obinsons Case: A man devises Lands to his Wife for life, the remainder to his Son, and if his Son dies without Issue, not having a Son, that then it should remaine over, and it seemed that this it a good Estate tayl, and it was adjudged accordingly.

Tayle.

If a man makes a Lease for three yeares, or such a small Tearme, to his Son or Servant to try an *Ejectione Firme*, or if it be made to another Inferior by a Superior, which cannot countenance the Suit, it shall not be intended Maintenance, nor buying of Tytles, which shall be punished.

Maintenance;

Trinity 7 Jacobi 1607. In the Common Bench.

**N**ote, an Attorney of the Common Bench was cited before the High Commission and committed to the Fleet, for that he would not swear upon Articles by the Commissioners ministered, and *Habeas Corpus* was awarded to deliver him, and a Prohibition to the Court of high Commission, see 1. and 2. *Eliz. Scroggs case* 175 b. *Dyer*, and there in *Margery Hynds case*, who 18 *Eliz. Noluit jurare coram Justiciarijs Ecclesiasticis super articulos pro usura*, and *Leyes case* 9. and 10 *Eliz. Michaelmas Rot.* 1596. and it is written in the Book of the Lord *Dyer* but not printed, the case was, *Ley* being an Attorney of the Common Bench was committed to the Fleet, by the Bishop of London and two others of the high Commissioners Ecclesiasticall, for that that he was present at a Masse, and he refused to be examined upon his oath-upon Articles administered by the high Commissioners, see also 5 *Edw. 4. Keyfers case* upon the statute of 2 H. 4. chap. 14. Which gives authority to the Arch-Bishop to imprison, &c. And see the Register fol. 36. b. The form of an Attachment against the Bishop, which cited *Aliquos Laicos, ad aliquas cognitiones faciendas*,

*Habeas Corpus.*  
*Prohibition.*

*faciendus, vel sacramentum prestandus nisi in casibus matrimonialibus & Testamentariis, &c.* But it was urged that the Judges of the Common Law, shall not have the exposition of the Statute of 1. Eliz. because it was an Ecclesiasticall Law, but it was resolved by all the Justices, that it belongeth to the Judges of the Common Law to expound this, for the Statute was temporall meerly, and with this 4. Ed. 4. 37. b. c. upon the Statute of 5. H. 3. chap. Which provides, *Quod libellus sit deliberatus parti in casu, ubi per legem deliberandus est, & hoc sine difficultate*, And though that this Act be meer spirituall, yet the Exposition of that lyes open to the common Law.

Michaelmas 7. Jacobi 1609. *In the Common Bench.*

### Estcourt and Harrington

Trespasse for  
Slander.

Party Jury of  
two Counties.

**I**N Trespasse upon the Case between George Estcourt Plaintiff, and Sir James Harrington Knight Defendant, for that, that the Defendant sayd that the Plaintiff was a forsworn and perjured man, which the Defendant justified, for that that the Plaintiff exhibited and English Bill, in the Marches of Wales, before the President and Councill there, and in the same suit made an Affidavit, upon which an Injunction was granted for the possession of Land in question between them, for the sayd Plaintiff, and that the sayd Affidavit was false, and the Plaintiff hath committed perjury in that, and this was allowed good Justification, the Jury was of the Counties of Gloucester and Salop, and the words of the Distringas were ordinary till towards the end, and that was *Ad faciendam quendam Juratum simul cum alijs Juratoribus comitatus nostri Salop*, and this was the Distringas directed to the Sheriff of Gloucester, and so *Mutatis mutandis* in the Distringas directed to the Sheriff of Salop; and note that the Jurors were sworn one of one County, and another of another County, *Alternis vicibus*, and 24. were returned of every County.

Michaelmas 7. Jacobi 1609. *In the Common Bench.*

### Simpson and Waters.

Action upon the  
Case for Slander.

**S**impson against Waters in an Action of Trespasse upon the case for Slander, that is, thou art drunk, and I never held up my hand at the Barr, as thou hast done, and agreed that an Action doth not lye for these Words, for peradventure he intended butttery Barr, And by Foster Justice, if he had sayd for Felony, that the Action doth

doth not lye, for many honest men are arraigned, but if he saith he was detected Action doth not lye, but if he saith he was convicted for Perjury Action lyeth as seemed to him.

In Trespass the Originall bore *Teste 3. January 6. Jacobi* and in the Count the Trespass is supposed 20 *January 6. Jacobi*, which is after the *Teste* of the Originall, and agreed that this shall not be aided by the *Statute* of Jeofailes, but if it were originall otherwise it is.

Error.

Michaelmas. Jacobi 1609. In the Common Bench,

Hare and Savill.

IN Covenant by John Hare and Hugh Hare against John Savill, the Plaintiffs made a Lease for years to the Defendant, rendering Rent at two Feasts, or within ten dayes after every of those, at the Temple Church, and the Defendant covenanted to pay the Rent according to the reservation, and for the non payment these Plaintiffs brought an Action of Covenant, to which the Defendant pleads levied by distress, and upon this the Plaintiffs demurred, and adjudged with the Plaintiffs accordingly, for that the Defendant for his Plea, hath confessed that it was not payd according to the reservation, for the Plaintiffs cannot distrain, if it were not behind after the day, and it was agreed, that where a Rent is reserved to be payd at such a Feast or within twenty dayes, that the Lessee in this case shall have Election if he will pay that at the Feast; or at the end of twenty dayes, for he is the first Actor, and the Lessor cannot distrain nor have action of Debt, till the twenty dayes be past, and it was agreed, that the Covenant shall not alter the nature of the Rent, but that nothing behind, or payment at the day, were good Pleas.

Covenant for Rent.

Defendant in Debt pleads to the Law, and was ready at the Barr to wage his Law; and it was resolved by the Judges upon conference with the Prothonotaries that it might be continued, but the Court would advise.

Continuance.

IN Action upon the Case upon *Assumpsit*, the Plaintiff counts, that diverse Goods were delivered to him in pawn, and that in consideration that he should deliver them to the Defendant, the Defendant assumed and promised to pay to him the Debt for which the Goods were pawned, and it was objected that the Count was not good, for that it doth not contain the certainty of the Goods which were pawned, and delivered to the Defendant, but to that this difference was agreed, that when Goods are to be recovered and Dam-

Assumpsit. Consideration.



gages for them, and are in demand, the certainty of the goods ought to appeare in particuler, as if a man pleades, that he was never Executor, nor administered as Executor, it is a good Plea, for the Plaintiff that he administered *Diversa bona* in such a place, so if he plead that he hath *Diversa bona variabilia* in other Diocesse, it is good in both cases without shewing what goods in certaine, see 11. H. 7. 29. Ed. 3. Also it was objected that the consideration was not sufficient, and then it shall be *Nudum pactum ex quo non oritur actio*, for the Plaintiff hath not any Interest in the Goods, and they were delivered him to keep, and not to deliver over, so that the delivery was vitious, and for that it shall be no good consideration, and of this opinion was Foster Justice: But Coke, Wraburton, Danyell, and Walmesley being absent, it seemes that the condition was good, as if a man in consideration that another will go to Westminster, or cure such a poor man, or marry a poore Virgin, assume to pay to him a sum of money: And though this consideration were not valuable, yet it seemes good: And he that pawned hath a property in the goods, and may have them againe.

Debt against  
Executors.

In debt against three Executors, two of them are out lawed, and the third pleades and Verdict against him, and it was resolved that the Judgement shall be against all by the Statute of 9. Ed. 3. for they all are but one Executor, and the Cost shall be against him which pleades, if the others confesse or suffer Judgement by default: And there shall be but one Judgement and not diverse, see 17 Ed. 3. 45. b. 11 H. 6.

Error.  
Vc. fa. & hab.  
Carpus.

Upon a *Wenire Facias* awarded, the Sheriff returns but 21. and the *Habeas Corpora* was against 21. only, and this was also returned, and upon that ten appeared, and upon this *Tales* was awarded, and triall had, and but ten of the principall Pannell sworne: And this was Error, but if twelve of the principall Pannell had appeared and served, it seemes that it shall not be error, for so it was resolved in *Graduors* case, where twenty three were returned, but twelve appeared and tryed the Issue, and this was resolved to be good and no error.

Michaelmasse 7, Jacobi, 1609. In the common Bench.

Buckmer against Sawyer.

Formedon in  
Remainder.

A Man seised of Land in *Galvolkind* hath Issue three Daughters, that is, A. B. and C. deviseth all his Land to A. in tayl, the remainder of one halfe to B. in tayl, the remainder of the other halfe to C. in tayl, and if B. died without Issue, the remainder of her

her Moytie to C. and her Heires, and if C. died without Issue, the remainder of her Moytie to B. and her Heires, the Devisor dies A. and B. dies: And the question was, if C. shall have a *Formedon* in remainder only, or severall *Formedons* for this Land: And it seemed to all the Justices, that one *Formedon* lieth well for all, for that, that it was by one selfe same conveyance, though that the Estate come by severall deaths, and this Action was to be brought by the Heire of C. after the death of C. See the three and four *Phil.* and *Mary Dyer.*

Note that after appearance of a Jury, and after that divers of them were sworn, others were challenged, so that it could not be taken by reason of default of Jurors: But a new *Disfringas* awarded, and at the day of the returne of that, these which were sworn before appeared, and then were challenged: But no challenge shall be allowed, for that, that they were sworn before, if it be not of after time to the first appearance.

Challenge.

*Michaelmasse 7. Jacobi, 1609. In the Common Bench.*

Baylie against Sir Henry Clare

Partition.

**BAYLIE** against Sir Henry Clare, the Writ was of two parts, without saying in three parts to be divided: And it seemed to *Nicholls* Serjeant which moved this, that it was not good, but error: But the opinion of the Court was that it was good: See 17. *Ed. 3.* 44. 19. *Ed. 3.* *breife* 244. 17. *Affise* with this difference, that if there are but three parts and two are demanded, there it is good without saying in three parts to be divided, for when parts are demanded it is intended, all the parts but one, and that it is only one which remains, see the Register fol. 16. 12. *Affise*: And it was adjudged in the Kings Bench in the case of one *Jordan*, that demand of two parts where there are but three parts is good, see 39. *H. 6.* *Salford* against *Hawlfston* in *Formedon* which demanded two parts where there is but three, and so of three parts where there is but four, it is good without saying, in three or four parts, to be divided: But if a man grant his part, this shall be intended the halfe, for *Appellatio partis dimidium partis continetur*, and a Writ of Covenant ought to be of two parts without saying in three parts to be divided, for so is the forme, and if in such case in three parts to be divided be incerted, the Writ shall abate, see *Thelwell* in his digest of Writs, 146. and by *Coke* if a man bring *Ejectione Firme* for ten Acres, and by evidence it appears that he hath but the halfe *Ex vigore juris* it shall not be good, but he said he would submit his opinion,

to the Judgement of ancient Judges of the Law which have often time used the contrary.

Dures.

Note that the Husband may avoid his Deed, that he hath Sealed by the duresse of Imprisonment of his Wife or Son: But not of his Servant, and so Mayor and Commonalty may avoid a Deed sealed by duresse of Imprisonment of the Mayor, for it is Idemptry of person, between the Husband and the Wife: See 21. Ed. 4. and 7. Ed. 4. A man may avoid Seisin for payment of Rent by coercion of distresse but not his Deed.

Michaelmasse 7, Jacobi, 1609. In the Common Bench.

Payn and Mutton.

Action upon  
the case for  
slander.

**I**N an Action upon the case by *Payne* against *Mutton*, the Plaintiff counts that the Defendant called him Sorcerer and Inchanor: And agreed by all the Justices that Action doth not lie, for Sorcerer and Inchanor are those which deale with charmes, or turning of Bookes, as *Virgill* saith, *Carminibus Circe socios mutavit ulifis*; which is intended Charmes and Inchantments, and Conjuratiō is of *Con et nico*, that is to compell the Divell to appeare, as it seemes to them against his will, but which is that to which the Devill appeares voluntarily and that is a more greater offence then Sorcery or Inchantment, which was adjudged that Action doth not lie for calling a man Witch, and said that he bewitched his Weare that he could not take any Fishes: *Dodridge* the Kings Serjeant saith that an Action lieth for calling a woman, gouty pockye Whore, and said that the Pox had eaten the bottome of her Belly out, and so it was adjudged that it lieth well for these words, get thee home to thy pokey Wife the Pox hath eaten off her Nose: But for the Pox generally Action doth not lie: But if he saith that he was laid of the Pox, then Action well lieth, for then it shall be intended the great Pox.

Prohibition.

Note that in Prohibition and *Replevin*, the Defendant may have *nisi prius* by *Proviso* without default of the Defendant, for he himselfe is *re vera* Defendant, and there are two Actors, that is the Plaintiff and Defendant: But the Court appointed that Presidents should be searched, the Plaintiff is not bound to prosecute *Cum Effectu* in this Court, as he is in the Kings Bench: And it was agreed that the manner of Pleading was agreement, as for *Retorno Habenda*, in the *Replevin* and *Pro consultatione habenda* in the Prohibition.

Michaelmasse



Michaëlmass 7. Jacobi, 1609. In the Common Bench

Miller and Francis.

**M**YLLER Plaintiff in Replevin against *Thomas Francis*, the will.  
 case was, *Richard Francis* was seised of Land held in Socage, Devise.  
 and deviseth that to *John* his eldest Son for a hundred yeares, the  
 Remainder to *Thomas* his second Sonne for his life, and made his  
 four other youngest Sonns his Executors, and after made a Feoff-  
 ment to the sayd uses, the Remainder to the sayd *John* his eldest  
 Son in tayl; *Proviso* that if the sayd *John* disturbed the Executors  
 of taking his Goods in his House, that then the sayd use and uses li-  
 mited to the sayd *John Francis* and his Heires shall cease, and after  
 declared that his intent was, that in all other points his Will should  
 be in his force, and it was pleaded that *John* did not suffer the sayd  
 Executors to take the sayd Goods in the sayd House, and if his Es-  
 tate for yeares, or in Tayl, or Fee-simple shall cease was the questi-  
 on, and it seemed to the Judges that the Condition shall not be  
 Idle; but shall have his operation, as it appears by *Hill and Granges*  
*case* and the *Lord Barkleyes Case* in the Comment. and the *Lord Che-*  
*neyes Case*, *Coke*, And it seems also, that it shall not be referred  
 to Estate in Fee-simple, for then it shall be void, and it shall not  
 be referred to a Term, for it is limited to an Estate limited to the said  
*John* and his Heires, but it seemeth it shall be referred to an Estate  
 tayl only, as it is 2 and 3. P. and *Mary Dyer* 127. 55. 81 H. 7. 6.  
 But the case was adjudged upon one point in the Pleading, for it was  
 not pleaded that *John Francis* had notice of the Devise, nor that he  
 had made any actual disturbance, and peradventure he entered as  
 Heir and had no notice of the Condition, and when the Executors  
 came to demand the Goods which were belonging to the Heir, and  
 annexed to the House, and he sayd that it doth not appear to them  
 to prove that an expresse notice was given in this case, the Books of  
 43 *Assise* where a man was attaint and after was restored by Parlia-  
 ment, and a Writ being directed to the Escheator, the Escheator re-  
 turns, that he was disturbed, and upon *Scire facias* the disturber  
 pleads, that he had no notice of the sayd act of restitution, and  
 for this he was excused of Disturbance: And see 35. H. 6. Barr,  
 162.

Michaëlmass

Michaelmas 7. Jacobi, 1609. In the Common Bench.

Waggoner against Fish.

Priviledge.  
Postea 218.

**W**AGGONER, brought a Writ of Priviledge, supposing that he had a suit depending here in the Common Bench, which was directed to the Mayor and Sheriffs of London, and upon the return it appears, that 4. Jacobi an Act of Common Councell was made that none should be retayler of any Goods within the same City, upon a certain pain, and that the Chamberlain of the said City for the time being, may sue for the said penalty to the use of the sayd City, at any of the Courts within the said City, and that the Defendant hath retailed Candles, and held a shop within the sayd City being a stranger, and against the sayd Act, and for the sayd penalty, the Chamberlain hath brought an Action of Debt within the sayd City, according to the sayd Act of Common Councell, and upon the return it appears, that by their Custome the Mayor and Aldermen with the Assent of the Commoners of the said City, may make By-Laws for the Government of the sayd City, and that the sayd custome, and all other their Customes, were confirmed by Act of Parliament, and upon this it seems, that though there be not remedy given, for this penalty in another place then in London, that yet if it be against Law he shall not be remanded, and if a Corporation hath power to make By-Laws, that shall be intended for the Government of their ancient Customes only, and not to make new Lawes, see 2 Ed. 3. *John De Brittons Case*, but it seems if this By-Law be for the Benefit of the Common-Wealth, that it shall be good, otherwise not, and it was Adjourned, see *Hilary* next ensuing, for then it was adjudged, that he shall not be remanded, see afterward *Michaelmas 7. Jacobi*, It was adjudged.

Adjournment  
of Term

**N**Ote that this Term was adjourned untill the Moneth of *Michaelmas* by reason of the Plague, and upon the adjournment this ensued, and was moved by *Telverton and Crook* at the Bar, and the Case was this.

Michaelmas 7. Jacobi, 1609. In the Common-Bench.

Infant levies  
Fine brings  
Error

**P**OYNES being an Infant levies a Fine, and in *Trinity* Term last past brought his writ of Error in the Kings Bench, and assigned for Error, that at the time of the Fine levied was, and yet is within age, and prayed that he be inspected, and insomuch that he had not

not his proofs there, he was not inspected but *Die datum est usque Obis Michaelis Proximo*, at which time came the said *Pynes* the day which was wont to be the day of the Essoyn, and prayed Justice *Crooke* (which was there to adjourn the Term) to inspect him; and to take his proofs, who did inspect him accordingly, *De bene esse*, and now before the Month of *Michaelmas* the Infant came of full age, and if this inspection were well taken, and what authority the Judge had upon that day to adjourn, was the question.

And *Flemming* cheife Justice sayd, that the day of Essoyn is a day in Term, and that the Court was full though there was but one Judge, and if the inspection had been the day of the Essoyn, and before the fourth of the Post, he had come of full age, this shall be very good, but the doubt rose as the case is, if upon the day of Adjournment the Judge had power to do any thing but to adjourn the Term, and for that it was appointed to be argued, and for the Argument of that, *Quere of my Author Lane.*

*Michaelmas 7. Jacobi 1609 In the Common Bench.*

Rivet Plaintiff, Downe Defendant.

IN an action upon the case upon an *Assumpsit*, the case appears to be this, Copy-holder makes a lease for a year according to the custome of the Mannor the Lord distrains the Farmer of the Copy-holder for his Rent, and the Copy-holder having notice of that, comes to the Lord, and assumes that in consideration, that the Lord should relinquish his Soie against his Farmer, touching the same distress he would pay the Rent by such a day, the Lord delivers the Distress, and for default of payment at the day, brings an Action upon the case, and upon *Non Assumpsit* pleaded, Verdict passed for the Plaintiff: And *Barker* Serjeant came and moved in arrest of Judgment.

First that a man cannot distrain a Copy-holder but he ought to seize, but *William* Justice and others to the contrary, and by him if a man makes a Lease at will Rendring Rent, he may distrain for this Rent, 9 H. 7. 3. The case of *Rescous*.

Secondly, He moved that when the Lord distraines, that now the Tenant hath cause of Action, that is *Replevin*, and for that it cannot be said *Set-off*, and so the consideration failes, but all the Court against that, and that this was a good consideration, and by *Flemming* cheife Justice, Distress is an Action in it self, because this is the cause of a *Replevin*, and when the Tenant brings his *Replevin* and the Lord avowes, now is the Lord an Actor, and so it is *set-off*,  
*sua*,



*sue*, and by him *set* is not only an Action hanging, but that which is cause of an Action, And Judgement was given for the Plaintiff.

Action upon the  
Case.

*Michaelmasse 7. Jacobi, 1609. In the common Bench.*

Flamming and Jales.

Action upon the  
Case.

**A**CTIONE upon the Case for these words: Thou hast stolen my Goods, and I will have thy neck, and maintainable.

*Michaelmasse 7. Jacobi 1609. In the Common Bench.*

Ayres Case.

**A**CTION upon the Case for these words; *Ayer* is an ar-  
rant Theife, and hath stolen divers Apple Trees out of *J. S.*  
Garden, and the Action well maintainable, otherwise if he had  
said, for he hath stolen, &c. for then it should not be Felony  
to steale Trees, and the word (For) shewes the reason why he  
called him Theife, but the word (And) not.

*Michaelmasse 7. Jacobi, 1609. In the Common Bench.*

Bryan Chamberlaines Case against Goldsmith.

Debt for Obliga-  
tion.

Hutton.

**I**N Debt upon an Obligation, in which the under Sheriff was  
bound to the Sheriff, for the performing of diverse Covenants  
contained in an Indenture made between them for the exercising  
of the said Office, and the Plaintiff assigned breach of Covenant,  
by which the under Sheriff hath Covenanted, that he would not  
execute any proceffe of execution without speciall warrant and  
assent of the Sheriff himselfe: And the sole question was, if this  
Covenant be a good and lawfull Covenant or not, and it was ar-  
gued by *Hutton* Serjeant for the Defendant, that counted that  
the Sheriff is a publick Officer, and may execute the office by him-  
selfe, yet when he hath made an under Sheriff, he hath absolute  
authority also, and it is not like to private authority, but it  
is as if a man make an Executor, provided that he shall not admi-  
nister, his debts above the value of forty pound: And as if an Ob-  
ligation with Condition, that if an Obligor shall keep the Obli-  
gee without damages for four Bees taken in *Wishernam*, that  
the Obligation shall be void, or as if a man takes an Obligation  
of his Prentise, with Condition that he shal not use his Trade within

five yeares, or within ten miles of such a place, or as a Steward takes an Obligation of another man with Condition that he shall not sue in other place but where he is Steward, or in the Common Bench, this abridges the subject of his right, and that the under Sheriff is a publick officer and mentioned in many *Statutes*, though he shall not be an Attorney the same yeare in which he is under Sheriff: And the *Statute of 23. H. 8.* restraines the under Sheriff, that he shall not let any prisoners to Bayl, but in the same manner as is contained in the *Statute*, and further he said, that all Obligations which have Impossible conditions are good, and the Condition void, but if the Condition be against Law, the Obligation and Condition also is void: And so he concluded that the under Sheriff is a publick Officer, and that his office cannot be apporportioned, and that the Condition was performing of a Covenant which was against Law and void, and so by consequence the Obligation void: And so praied Judgement for the Defendant: And for the Plaintiff is was argued by *Dodridge* Serjeant of the King, that the Obligation is good and not void: And he said that there are two Officers to all the Courts of the King, which are to execute all Writs, and that these Officers are Sheriff and Bishop, and the Law doth not take any notice of under Sheriff, or Warden of spiritualities, for the Sheriff himselfe shall be amerced and not the under Sheriff, which is but his substitute, and it appears by 3. *H. 7.2. b.* That all Writs shall be directed to the Coroner, and by him ought to be executed, and 10. *H. 4. 42.* The Sheriff was merced for an Arrest made by a Bayliff of a franchise, and and though that the Warden of *Westminster Hall* is an Officer to the Kings Courts to some purpose, yet no Writ shall be directed to him, as it appears by 8 *Ed. 4. 6.* Also he agreed that the power of the Sheriff is double, that is Ministeriall and Judiciall, and some times he executes both together, as in *Redisseisin*, for of that he is Judge and also is Minister to the Court of the King, and yet he is but one man, for the Law doth not take any notice of under Sheriff, nor intends, that he shall supply any of these Offices, for the under Sheriff is but servant to the Sheriff, and to execute his Ministeriall power only, and if it be so, he may limit his Authority at his pleasure: And if the Sheriff make a false returne, or otherwise retard, or make an uncertain returne, he himselfe shall be punished by Action, for the Law requires knowledge and intelligence of the Sheriff, and the ancient *Statutes* made in the old time, make mention of Sergeants at Mace, and yet they make not any mention of under Sheriff, which is but servant.

And he agreed that an Obligation taken with Condition against Law is void, but he said that this is not against Law, for the under Sheriff

Sheriff is a person of whom the Court doth not take any notice, for he is but servant of the Sheriff, and for this case, and removable at his pleasure, and he may exercise his office by himselfe when he pleases, and also he argued that the authority which may be totally countermanded, may be countermanded in part, and that the under Sheriff hath *Derivata potestas, qua semper talis est qualis commissarius*: And by 35. H. 6. A man may make two Executors, one for his Goods in *Middlesex*, and the other to administer the Goods in *London*, and this is good between them: But not against a stranger, for he ought to sue them both, and he shall not be prejudiced by that, and so 32. H. 8. *Brook* Executor, 255. A man made two Executors *Proviso* that one should not administer in the life of the other, and 36. H. 8. 61. Feoffment and Letter of Attorney to make Livery to three or to any of them, Livery cannot be made to two, and also he said that there is no difference between power derived from a private person, and power derived from the publick, when this power comes to execution: And admitting that the Sheriff may limit the authority of his under Sheriff for a time, as it seems that he may, then of this it followes, that he may alwaies abridge and apportion his authority: And he agreed that when an under Sheriff is made, diverse *Statutes* have been made to punish him if he offend: But the Sheriff is not compellable to make under Sheriff: And as to the Obligation, that if an execution be delivered to the under Sheriff, against one which is in his presence, that he ought to execute it, he saith that the Law is not so, for the party ought to deliver the execution to the Sheriff himselfe, for it doth not appeare that he hath an under Sheriff: if he have received a Writ of discharge or not: And also the Office of the Sheriff is of charge to the King and to the Common Wealthe, and the execution of Writs may be prejudicall and penall to the Sheriff himselfe: And for that he may well provide, that he shall have notice of every execution which are most Penall: And also in all the Indenture now made, he doth not constitute him to be his under Sheriff, but only for to execute the Office, and for these reasons he seemed the Obligation is good, and demands Judgement for the Plaintiff: But it seemes to all the Court, that the Covenant is void, and so by consequence the Obligation, as to the performance of that void, but good to the performance of all other Covenants: And *Coke* cheif Justice said, that the Sheriff at the Common Law was eligible as the Coronor is, and then by the death of the King his Office was not determined, and also it is an intire Office, and though the King may countermand his Grant of that, intirely, yet he cannot that countermand by parcels, and also that the under Sheriff hath Office which is intire,

and

CONT.



and cannot be granted by parcells, and this Covenant will be a meane to nourish bribery and extortion, for the Sheriff himselfe shall have all the benefit, and the under Sheriff all the payn, for he is visible, the under Sheriff and all the Subjects of the King will repaire to him, and the private contracts between the Sheriff and him are invisible, of which none can have knowledge but themselves.

And Warburton sayd; that in debt upon escape, &c. are against the Sheriff of Nottingham, he pleaded *Nihil debet*, and gives in evidence, that the Bayliff which made the Arrest, was made upon condition, that he should not meddle with such executions, without speciall warrant of the Sheriff himselfe, and his consent, (but it was resolved (this notwithstanding) that the Sheriff shall be charged in: and in the principall case, Judgement was given accordingly, that is, that the Covenant is void

Note that the Sheriff of the County of Barkes, was committed to the Fleet, for taking twenty shillings for making of a warrant upon a generall *Capias utlagatum*, for all the Justices were of opinion, that the Sheriff shall not take any Fees for making of a warrant or execution of that Writ, but only twenty shillings and foure pence, the which is given by the Statute of 23. H. 6. for it is at the Suit of the King: But upon *Capias utlagatum unde convictus est*, which is after Judgement, it seemes it is otherwise.

Sheriff committed to the Fleet.

A man grants a Rent to one for his life, and halfe a yeare after to be paid at the Feasts of the Anunciation of our Lady, and Michael the Archangell by equall portions, and Covenants with the Grantee, for the payment of that accordingly; the Grantee dies 2. February, and for twenty pound which was a moyety of the Rent, and to be payd at the anunciation after, the Executors of the Grantee brings an Action of Covenant, and it seems it is well maintainable. And Coke cheife Justice sayd, That if a man grants Rent for anothers life, the Remainder to the Executors of the Grantee, and Covenant to pay the Rent during the Term aforesayd, this is good Collective, and shall serve for both the Estates, and if the Grantee of the Rent, grant to the Tenant of the Land the Rent, and that he should distrain for the sayd Rent, this shall not be intended the same rent which is extinct, but so much in quantity, and agreed that when a Rent is granted, and by the same Deed the Grantor covenants to pay that, the Grantee may have annuity or Writ of Covenant at his Election.

Grant of a Rent.

Michaelmas 7. Jacobi, 1610. In the Common Bench.

Waggoner against Fish, Chamberlain of London.

Priviledge of  
London.

**JAMES** Waggoner was arrested in London, upon a Plaint entered in the Court of the Maior in Debt, at the suit of *Cornelius Fish* Chamberlain of the sayd City, and the Defendant brought a Writ of Priviledge; returnable here in the Common Pleas, and upon the return it appears, that in the City of London there is a custome, that no forrainger shal keep any shop, nor use any Trade in London, and also there is another Custome, that the Maior, Aldermen, and Commonalty (if any custome be defective) may supply remedy for that, and if any new thing happen; that they may provide apt remedy for that, so if it be *congrua & bona fidei consuetudo rationi consentia & pro communi utilitate Regis, civium & omnium aliorum ibidem confluentium*, and by Act of Parliament made 7R. 2. All their customes were confirmed, and 8Ed. 3. The King by his Letters Patents granted that they might make By-Laws, and that these Letters Patents were also confirmed by Act of Parliament, and for the usage certified, that in 3Ed. 4. and 17. H. 8. were severall acts of Common Council, made for inhibiting Forrayners to hold any open shop, or shops or Lettice, and penalty imposed for that, and that after, and shewed the day in certain was an Act of Common counsell, made by the Mayor, Aldermen, and Commonalty: And for that it was enacted, that no Forrayner should use any Trade, Mistry or occupation, within the said City, nor keep any Shop there for retayling, upon payn of five pound, and gives power to the Chamberlain of London for the time being to sue for that by Action, &c. in the Court of the Mayor, in which no Essoyn nor wager of Law shall be allowed, and the said penalty shall be the one halfe to the use of the said Chamberlain, and the other half to the poor of Saint *Bartholomewes* Hospitall: And that the Defendant held a shop and used the Mistry of making of candles the seventh day of *October* last, and for that the Plaintiff the ninth day of the same month then next ensuing, levied the said plaint: And upon this the Defendant was Arrested, and this was the cause of the taking and detaining, &c. And upon argument at the Bar by Serjeant *Harris* the younger for the Defendant, and *Hutton* for the Plaintiff, and upon sollemne arguments by all the Justices, *Coke, Walmesley, Warburton, Danyell, and Foster*, it was agreed: That the Defendant shall be delivered, and not remanded.

*Harris.*

*Hutton.*

manded : And the case was devided in to five parts.

The first the custome.

Secondly, the confirmation of that by Act of Parliament.

Thirdly, the grant of the King, and the confirmation of that by Act of Parliament.

Fourthly, the usage and making of Acts of common counsell according to this.

Fifthly, the Act of common counsell upon which the Action is brought, and upon which the Defendant was Arrested.

And to the first, which is the custome, it was also said, that this consists upon three parts.

That is, first if any custome be difficult.

Secondly, if it be defective.

Thirdly, if *Aliquid de novo emergit*, The Mayor, Aldermen, and Commonalty : *Possunt opponere remedium*, and that there are foure incidents to that remedy.

First it ought to be *Congruium Ratione*.

Secondly, *Bene fidei consonum*.

Thirdly, *consentaneum rationi*.

Fourthly, *Pro communi utilitate regis, civium & comodum aliorum ibidem consistentium* : But all the question was upon the remedy, for it was agreed that the custome shall be good : But it was doubted by *Foster and Danyell* that there was no good returne, for it was but as recyted ; and it was not averred and positively said, that there was such a custome, and to prove that the case of 28 H. 6. was cited, where in debt upon an Obligation, the Defendant demands *Oyer*, and upon the view saith, that it appears by the said Obligation, that two others were joyntly bound with him not named, Judgement of the Writ, and 24. Ed. 4. Where it was pleaded, as it appears by the *Letters Patents* of one King, and in 11. H. 4. in returne of a Sheriff: But *Coke* answered and took a difference between returne upon a Writ of privilege, and upon which no Issue may be joyned, nor demurrer, and that it is but for an Informer of the Court, and other pleads : And for this it seemes to him, that it is good as to that, and he conceived that by the Grant of the King the custome is destroyed, for the King by his Grant cannot add nor diminish any thing of the custome, no more then of Prescription, and exceptance of Grant shall be extinguishment of one as well as of the other, as it appears by 8. H. 4. 15. H. 7. 5. 38. H. 8. B. Prescription, 7 R. 2. But to this the Lord *Coke* gave no answer, and for that it seemes they were no Grants, but confirmation rather of customes, and they further denied that the customes are confirmed by the Statute of 7. R. 2. for this is only for the confirmation of *Magna Char-*



ta, and of all former Statutes, and of *Charta de Foresta*, and the liberties of the holy Church, and there is not any mention of the customes of London, but to this the Lord Coke answered, that they ought to credit their returne, and for that it seemes, that it is a private Act, and they ought to adjudge of that as it is made, as 7. H. 6. 6. And if it be false the party greived may have an Action upon the case, so it was agreed that the custome, that no forrainer shall hold any shop, nor sell in any shop by retayl, and that they may make By-Lawes, for the ordering of their ancient customes, are good customes without any confirmation by Act of Parliament, or Grant of the King or otherwise: And if any thing happen *De novo*, that they can *apponere remedium* with the restrictions aforesaid, for the Lord Coke saith that London is *Antiqua civitas*, and was of great fame and reckoning, amongst the most ancient Cities, for it was said by *Anianus Marcellinus* which wrote 1200. yeares past, that London was then *Opidum vetustum*, and *Cornelius Tacitus in vita Neronis* saith, that then there was under the Romans Government, there was here *Negotiorum copia, & commercia maximorum celebris*, and he well knew for he was here seven yeares, and married the Daughter of *Agricola*, who was ancient *Gilda Mercatoria*, and for that it was well governed and continued in good Order, for *Ubi non est ordo, ibi est infirmum & sempiternus Horror & confusio*, and *Gilda* is a Saxon word, and is the same for *Fraternitas*, and *Northfolk* and diverse other places in the Country the name continued, but this is another sence, for *Gyld* signifies to pay, and for that it is sometime demanded if a man inhabite in a plate gildable or within Franchise, and the Place gildable is subject to foot and Lot, and all other charges, but the Franchises are places exempt, but no person which is of a *Gyld* or fraternity, may be exempted nor by the Grant of the King nor otherwise, but shall be subject to all the charges of the *Gyld*, and Fraternity, and the King cannot make any man free of their *Guyld* when that is created, for there are but three waies to make a man free of that.

First, by Birth which is the most eldest.

Secondly, by Service which is of merits.

Thirdly, By redemption which is power which only remains in the Maior, and the Court of Aldermen, in this case in London, and such *Gyld* can never have beginning but by Grant, but by prescription, as the custome of *Gavelkinde*, that a man may devise his Lands, or that the Land shall disend to the youngest Son, and that the King cannot make, any stranger free of such *Gyld* or Fraternity appears in *Rotulo patentium*, 32 Ed. 3. Where the King by his Letters patents granted to one *Iohn Faulcon*, that he should be  
frank

frank and free of the City of London, and that he should keep an Apothecaries shop there, but the Patenteer could not have his Freedome by this grant, and for that the King wrote his Letters to the Maior and Aldermen, and requested them to make the sayd *Faulcon* free of the sayd City, and upon that it was done accordingly, but not upon the Grant, and so it was adjudged in *Darvies case* 44 *Eliz. Trinity*, that if the King grant to one the sole making of Cards in England, and that none shall bring any Cards into England to be sold but the patenteer, and it was adjudged that though none may have Park or Warren, and such other matters of Pleasure without the Kings Grant, and though that playing with Cardes be but a matter of Pleasure, yet the making of them is a matter of profit, and the bringing of them into England is a matter of Trade, and the inhibition of that is hinderance of Trade, and makes a Monopoly, that the Grant was voyd, and 3 *Ed. 3. 3. John of Sudfords Case*, where the Case was, a Free-holder levied a fold upon his Soyl, and Freehold of his own, and the Defendant spoyled it, and broke it, and upon that the Plaintiff brings a Writ of Trespass; the Defendant justifies that he was Lord of the Town, and there had been a usage there, and had been of time out of memory, &c. That no man of the same Town ought to levy a fold without the agreement and leave of the Lord: And for that that the Plaintiff had done it, the Defendant pulled it down as well to him it was lawfull, and it seems a good custom, and with this agrees 5 *Ed. 3. John de Hayes case*, and 10 and 11 *Eliz. Dyer* 279. 10. prescription, by the Maior Sherif, and Citizens of York; Goods forraigne bought and forraign sold shall be forfeited, and that he may seise them it was adjudged a good prescription, but the King by his Letters Patents, cannot give such power to them.

And Coke was cleerly of opinion, that the case was not within the Statute of 9 *Ed. 3. chap. 2. 25 Ed. 3. 11 27 Ed. 3. 11*. And it was agreed by them all, that a Merchant or any other man may sell Goods in grosse, as he may sell a hundred tun of wine, or peices of Cloath, and one Tun of Wine to one man, or a peice of Cloath to one man, and another to another man, till he hath sold all, that this was not retailing, but they cannot sell by the yard or keep a shop, but it was also agreed that some goods a man might sell as well in their Market, if he do not keep a shop here without any offence, and it was objected that this By-Law was not good, for that it was for private good, and also the penalty which was to be inflicted was too great.

For first the Maior, Aldermen, and Citizens, make the Law, the suit for the penalty ought to be before the Mayor, and the Maior and Citizens ought to have part of the Penalty, so that the Mayor shall

shall be Judge in his own cause, which also was one of the Reasons of the Judgment in the Chamberlain of *Londons* case 5. *Coke* for that that the penalty was so small, that is a penny for every cloth which shall be sold in *Blackwell hall*, and this was for publick good, for here shall be search if it were good and merchantable, but it was agreed by all, that every Town may make a By-Law, which is *pro bono publico*, without any prescription or custome, and this shall be good, and being made by the greater part shall bind the residue, but if it be for private good, as for the ordering of the common or such like, shall not be good to bind any man without his assent, without speciall custome, according to the Judgements in the Chamberlaine of *Londons* Case, and *Clarks* case 5. of *Coke* in his cases of By-Lawes: But *Coke* is cleer that the remedy, that is, the By-Law was good and agreeing to the custome in every point, and that the penalty was fit and good, and for quantity and quality, and that to the quantity he agreed, that they could not inflict confiscation of Goods nor Imprisonment, but may inflict pecuniary punishment, as it appears by *Clarks* Case, and the Action may be brought for that, so that for the quality it was good: And so as to the quantity which was *Secundum quantitatem delicti*, for he conceived it was a greater offence, to hold a private shop then publick, for this is not in view nor subject to search & reformation, as well as if it were publick, and for an old Act of Common Council, he which keeps a publick shop shall forfeit ten shillings, and *clam delinquens punietur magis quam palam*, & now the ounce of silver is increased in value, for it is worth five shillings four pence, and then it was worth but three shillings four pence, and so for quantity and quality *Et congruum & ratione consonum*: And it seems to him that it is not *Bona fide*, that a Forrainger should hold a private shop, but *Dissentaneum*, for *London* is a Market overt, every day in the Weeke, but Sunday, as it appears by 11 H. 6. 19. And in *Dunstable*, the Prior brought an Action against a Butcher, for that that *Dunstable* was an ancient Town, and that this was a market overt two dayes in the Week, and the Defendant sold flesh in an inward roome, the Defendant pleads custome to warrant that, and adjudged that it was not good, for the usage of Trade in such Corners is not, *Bona fidei consonant*, and after he pleaded that he sold the flesh in an open shop in the Market, and this was allowed to be a good Plea, and if it be so in *Dunstable*, a fortiori, it shall be so in *London*, and for the same reason also it shall not be *Rationi Consentaneum*, to hold such inward shops, and also it is for *Communi utilitate*, that is, of the Citizens of the King, and of all others, that Forrainers shall not hold any shops in *London*, for it appears by the return that Forrainers shall not be subject to Scot and Lot in *London*, and shall not be Officers



Officers which are matters of great charge, so that if it shall be so they should be preferred before Free men, and without question it is inconvenient for the Citizens, that any Forrainger should use any Trade here, and it would be a destruction to Citizens, that a Forrainger should not be subject to their charges, and yet should take benefit of the Trade within the City.

Secondly, And for the Benefit of others that strangers should not be received to use any Trade within the City, for this is the cause of Depopulation, depredation, and destruction in all other Townes and Burroughs in England, which is prejudice to all others.

Thirdly, it is prejudiciall to the King, that such a company of Inhabitants should be resident in London, which is *Camera Regis*, for this is the cause of infection of the Aire and sicknesse, so that the King and all the State is prejudiced by it, but the sole doubt which was conceived by *Coke*, was for that that it doth not appear by the return, that the Defendant had used the Trade of Tallow Chandlory nor sold any Candles, but only that he kept a shop, and used the mystery of making Candles, but if the return had been that he used the Trade of Tallow Chandlory, this had been good, for that implies *Tantum vendit*, for that had been, that he had sold, for Trade is in *Tradendo*, which is to deliver over, and the Intent of the act is not that hee shall be punished for making of Candles, if hee do not sell them, for the sale is the wrong, and so the Servant of every Noble man or other which makes Candles or other thing for his Master, or for his own use, should be within the penalty of the Act, and with this agreed *Foster and Daniel*, and for this cause only it was resolved that he should be delivered and not remanded.

Hillary 7. Jacobi, In the Common Bench.

Cholke against Peter.

THE Case was this, The Lord *Rich* being seised of the Chase of *Harfield*, granted and sold to Sir *Thomas Barrington* Knight, and his Heires, all the Wood growing, and to grow upon a part of that, and excepted the soyl, and further that he might inclose every sixteen Acres of that, and this to hold in severall for the Preservation of the Spring, according to other Statutes of the Realm, and this Grant was confirmed by a private Act of Parliament, and that the Grantee might hold it in severall without suit of the Kings Officers, with a saving of the right of all strangers, and a Commoner put in his Beasts to take his common in one parcell of that which was inclosed, against whom the Grantee brought an Action of Trespass, and in this the only question was, if this Grantee of the Trees, which

where the  
Owner of Wood  
may inclose.

had not any Interest in the Soyl, might inclose against a Commoner by the Statute of 12. Ed. 2. chap. 7. was the question, for it was agreed, that if a man grant Trees growing and to grow, roone and his Heires, and except the Soyl, the Grantee hath Fee simple in the Trees, but hath nothing in the Soyl, according to the 14. H. 2. and 3. H. 6. 45. *Tess case*, 5. Coke 12. So if a man make a Feoffment of land except the Woods, all woods are except by that, and if Woods be cut, and after grow againe in the same place, this is also excepted; but if Woods after grow in another place this shall not be excepted, for it was no wood in *Effe* at the time of the Feoffment, so if a man grants to another to dig Coles in his Soyl, this is but to take profit, and the Soyl doth not passe, as it is agreed in 11. *Effe. Dyer* 245. And it was said by *Hutton* Serjeant that he had seen an *Ejectione Firme* brought upon a Lease of *Usurata terra*: But it was agreed by *Coke* chiefe Justice and *Foster*, that the Statute of 22. Ed. 4. chap. 7. was repealed by the Statute of 35. H. 8. for this is the negative, and for that is repeal of a former Statute, but if the fall had been in the affirmative otherwise it should be, and it was also agreed that this was not within the Statute of 35. H. 8. for that appoints of what age the wood shall be when it shall be inclosed, and by this recompence is given to the Commoner; but here it is not averred by pleading of what age this wood was which was inclosed, and for that it was adjudged that the Action is not maintainable against the Commoner, see *Pastbe* 8. *Jacobi* for another argument at the Bar, and also by the Judges.

*Hutton.*

*Hillary* 7. *Jacobi*, 1609. In the Common Bench.

### Vivion against Wilde.

Arbitrement.  
Submission.  
Revocation.

A Man was bound in an Obligation to another with Condition, to stand to, abide, and performe the award of two Arbitrators, and before the award, by his writing the Obligor revoked the authority of one of the Arbitrators: And it was agreed by all, that this Obligation is become single without Condition, and yet it was not pleaded that the Arbitrator had notice of the revocation before the award made: And yet for that it was pleaded, that *Revocavit*, it was agreed that that implies notice, for without notice it is no revocation: But it was agreed that if a man submit himselfe to the award of another, and after he revokes his authority: But before the Arbitrator had notice of that he makes the award, the award is good and shall be performed; so if a man make a Feoffment and Letter of Attorney to make Livery:

And

And before Livery made he revokes the power of the Attorney: But before notice the Attorney makes Livery, this is good; but if the Feoffor makes a Lease or feoffment to another before the Livery made by the other, this is a Countermand in Law, and shall be good without notice, for *Partior est dispositio legis quam hominis*. But where a man makes actual revocation of the authority, and before notice the other executes his authority, and in pleading the other pleades, *Quod revocavit*, the other party may reply, *Quod non revocavit*, and give in evidence that he hath no notice of that before the execution of his authority, and this is good, for without notice it is no revocation, where revocation is the act of the party. The case is entered *Trinity 7. Jacobi Rotulo 1609. Vivian against Wild.*

*Hilary 7. Jacobi 1609. In the Common Bench.*

*Smallman against Powys.*

A Man made a Lease for life rendring Rent, and after the Lease for by Indenture in consideration of fifty pound, deviseth and granteth the Reversion, to have from the day of the date for 99. yeares rendring a Rent also, which was lesse then the first Rent, and the Grantee of the reversion destrains for the rent reserved upon the Lease for life being behind: and the sole question in this case was, if the reversion shall passe without Attornment, and it was said, that in all cases where a use may be raised by the Common Law, and that it shall be performed by order of Chancery, that in these cases the use shall be executed by the *Statute of 27. H. 8.* of uses, and one case was cyted by *Harris* Sergeant 14. and 15. *Ellis*. where the Brother was Tenant in tayl, the remainder to his Sister in tayl, the Brother by Deed which was Indented in parchment, but made in the first person, and no mention of Indenting in the Deed, and the Deed was intolled within three moneths, and after Livery and Seisin was made, and it was adjudged that the Deed entures as a Bargaine and Sale, and that nothing passes by the feoffment, so that it was no discontinuance, but that the Sister might enter after the death of her Brother without Issue.

The Chief Justice said, that it was a good Bargain and Sale, though that the words Bargain and Sell were not in the Deed, but he conceived if a Letter of Attorney be inserted in the Deed, so that it may appear that the intent of the parties is, that it should not enture as a Bargain and Sale, but as a feoffment, there it is otherwise, so if a man covenants to stand seised to a use, if it be in con-

Devise and  
grant entures  
to bargaine and  
Sale.

Harris.



consideration of money, and the Deed is enrolled: there this shall enure well, as Bargain and Sale, as it was adjudged in *Bodley* case 7. *Coke* 40. a. but the Statute of 27. H. 8. of enrollments doth not extend to a Term; for the words of the Statute are, that no freehold shall passe, &c. But it seemes in the principall case, that the Statute of uses, executes the use which is raised by this Grant, and that the Grantor shall stand seised, &c. And all the Justices insisted strongly upon the Limitation of the Estate, from the day of the date of the Grant and the Reservation of the Rent immediately, and upon this concluded, that it was the intent of the parties that the Grantee should have the Rent reserved upon the first Lease; and should pay the Rent reserved upon his estate, and that when words of diverse natures are incerted in one conveyance, the Grantee hath election to use which of them that he will, as it appears by *Sir Rowland Haywards* case, and by *Daniel*, if a man makes a Bargain and Sale in english, and makes Livery, *Secundum formam Chartae*, this shall not be good: But if it be in Latine otherwise it is, for this word *Vendo* is compounded of *Do*, and it is an apt word for *Surv.* that Livery might be made: And agreed all that the reversion passes well without Attornment, and that these words Demise and Grant shall be taken and enure to a Bargain and Sale, and Judgement was given accordingly.

Lease to determine upon Limitation.

A man made a Lease for yeares, to two if they lived so long, and it was resolved by the Court, that this determines by the death of one of them; according to the resolution in *Bradwell* Case 5. *Coke* 9. a. and Judgement was given accordingly, and there the case of *Trumping* was recited, which was this; Lands was let to one for one and twenty yeares, if the Husband and wife, and the Issue male of their Bodies so long live, and it was there adjudged, that the Lease doth not determine, during the lives of any of them, for in this disjunctive, it is referred to an Intice Sentence, and is as much as if he had sayd, if the Husband or the Wife, or the Issue of their Bodies so long live.

Hilary 7. Jacobi 1609. In the Common Bench.

Borough of Tarmouth.

Grant of the King that the Burrough should be incorporated.

THE King John by his Letters Patents granted that the Burrough of Tarmouth should be incorporated, and the grant is made *Burgensibus* without naming of their Successors, and also he granted, *Burgensibus tenori placita coram ballivis*, and in pleading it was not averred that there were Bailiffs there, and it was objected that the Burrough cannot be incorporated, but men which inhabits inchar, but

but to that it was resolved that the Grant is good, and the Lord City sayd, that he had seen many old Grants, to the Citizens of such a Town and Good, and so that the Grant *Burgensibus*, that the Burrough should be incorporated, being an old Grant should have favorable construction; but the doubt was, for that that it was not averred that there were Bailiffs of *Tarmonth*; and if a Grant to hold Pleas, and doth not say before whom, the Grant is voyd, according to 44 *Ed. 3. 2 H. 7. 21 Ed. 4.* and for that it was adjourned: But the opinion of all the Court was that the Grant made *Burgensibus* was good without naming of their Successors, as in the case of Grant *civibus*, without more.

Note that Executors or Administrators shall not finde speciall Bail for the Debt of the Testator, though that the debt be for a great sum as three thousand pound or more, for it is not their Debt, nor his Body shall not be lyable to execution for that.

Bayle.

43 *Ed. 3.* Suit was commenced, hanging another Writ, it is a good Plea, though that the Writ was returnable in the Common Bench, and the last Suit was begun in a Base Court, but if so be, and doth not appeare to this Court, that the Plaintiff begun suit in a base Court, for the same Debt, for which the Suit is here begun Attachment shall be awarded, see 2 *H. 6. 9 H. 6.* but this ought to appear to the Court by *Affidavit*, &c.

Suit begun,  
hanging another  
Writ.

Hillary 7 Jacobi 1609. In the Common Bench.

Chapman against Pendleton.

IN second deliverance, the case was this, A man seised of a house and fifty Acres of Land held by Rent, fealty, and Harriot service, enfeofs the Lord of three Acres parcell of the Land, and after infeofs the plaintiff in this Action of three other Acres, and upon this the sole question was, if by this Feoffment to the Lord of parcell Harriot service is extinct or not.

Casuall intire  
Services.

Harrie Serjeant conceived that the Harriot remaines, for he sayd that it is reserved to the Reversion of the Tenure, but it is not as annuall Service, but casuall, and it is not like to rectify, for that it is incident to every service, And by 43 *Ed. 3. 3* It is no part of the service but Improvement of the service: And *Bracton* in his Tractate *De Relevi* 2 Booke 2. 7. saith, that *Est alia prestatio vocata Harriot &c. Que magis fit de gratia quam ex jure*, and it is not like to a releife, see the Booke at large, and he agreed that if the Tenant had made fifty severall Feoffments to fifty severall men, that every of them shall pay a severall Harriot, as it appears by *Brerertons Case*, 6 *Coke*

Harris.

1. 1. Ed. 3. Harriot 1. 1. Ed. 3. Avowry 184. 3. Ed. 3. *Modum* 106.  
 1. 1. Ed. 3. Avowry 101. 24. Ed. 3. 73. n. 34. *Affise* 15. 22. Ed. 4. 36. 37.  
 29. H. 8. *Tenures* 84. But he grounded his Argument principally  
 upon *Littleton* 222. 223. Where it is sayd, that the reason why Ho-  
 mage and Fealty remains, if the Lord purchase part of the Tenan-  
 cy is for that that they are of annual Services, and it seemed to  
 him, that *Littleton* is grounded upon 7 Ed. 4. 15. Extinguishment  
 2. 8 Ed. 3. 64. 24. Ed. 3. B. Apportionment last case, which accords  
 the reason, and upon this he concluded, that for that that the  
 Harriot is not annuall, it shall not be extinct by the Feoffment but re-  
 maines, but he agreed if a man makes a Lease for years rendring Rent,  
 and partell of the Land comes to the Lord, the Rent shall be appor-  
 tioned if it be by Lawfull means, as it appears by 6 R. 2. F. *Quid*  
*Jurisdiclamat* 17. *Plesingtons Case*, and 24 H. 8. Dyer 4. 1. *Russells*  
 case, by which, &c.

Nicholls.

Nicholls Serjeant, that it hath been agreed that it is intire service,  
 and that then he concluded upon that that it shall be of the nature  
 of other intire services, as it appears by 2 Ed. 3. Avowry 184. and 34  
 Ed. 3. F. Harriot 1. 5. Ed. 2. Avowry 206. And he agreed that in  
 the case of *Littleton* the Homage and Fealty remain, and the escuage  
 shall be appportioned, but this is not for the reason alledged in *Little-*  
*ton*, that is, for that that they are not annual services, but for that  
 that the Homage is incident to every Knights service, and as the Lord  
*Coke* sayd, fealty is incident to every service in generall, and the Te-  
 nant shall make Oath to be faithfull and foyall to his Lord for all the  
 Tenements which he holds of him, and the reason for which the  
 Escuage shall be appportioned, is for that that it is but as a penaly  
 which is inflicted upon the Tenant for that that he did not make  
 his services, as it appears by the pleading of it, and shall be appor-  
 tioned according to the Assesment by Parliament, and by 22 Ed. 4. It  
 appears that this purchase by the Lord, is as a release, and if the  
 Lord release his services in part, this extincts the services in all, and  
 he sayd there is no difference where an intire service is to be payd,  
 every third or fourth year, and where it is to be payd every year  
 as to that purpose, and yet in one case it is annuall, and in the o-  
 ther it is casuall, and yet in both cases if the Lord purchase parcell  
 of the Land of the Tenant, all the intire services shall be extinct and  
 gone, though that they are to be performed every third or fourth  
 year, by which, &c.

Foster.

Foster Justice, that the Harriot is entire service, and for that  
 though that it be not annuall, it shall be extinct by purchase of par-  
 cell of the Tenancy by the Lord, as if a man makes a Feoffment with  
 warranty, and takes back an Estate of part, the warranty is extinct,  
 as it appears by the 29. of *Affise*, so if a man hold his Land by the ser-  
 vice



vice to repaire parcell of the fence of a Park of the Lords, and the Lord purchase parcell of the Tenancy, the Tenure is extinct, as it appears by 15 Ed. 3. And it is agreed in the 21 H. 7, in *Kellawaies Reports by Fromick*, that there is no difference between Harriot and Release, and Release shall be extinct, and so he concluded that the Harriot is extinct.

*Daniell* Justice accordingly; and he said that this purchase shall be as strong as release: And if the Lord hath released the service intire for part, it shall be extinct for all, and if Tenant holds by Suite to the court of the Lord, and the Lord purchase parcell of the Tenancy the Suit is extinct, as it appears by 27. H. 7. and *Fitz. Na. Bre.* And so concluded that the Harriot service is extinct by the purchase aforesayd.

*Warburton* accordingly: And said that in *Littletons Case*, the Homage and Fealty shall remain, for they are personall services, and for that shall remaine intire, and of Rent shall be an apportionment by the *Statute of Westminster 3. De quia emptores terrarum*: But for other intire services by the purchase of the Lord, be they annuall or casuall, and they are extinct, and 21. Edward 4. was a Suite for a Hawke, which was kept back twenty yeares, and so for Suit if the Tenants make a feoffment to diverse, they shall make but one Suit, but they all shall make contribution to the Suit, but if the Lord purchase parcell, he cannot make contribution: And though that the Homage and Fealty are personall services, the Horse and Hawke are of the nature of land, so the Harriot is of his goods, and if the Tenant hath no goods, the Lord shall loose it, and for that he concluded as above.

*Walmesley* accordingly: And he said, if a Tenant hold by intire services of two Lords, and one purchase parcell of the Tenancy, all the intire services shall not be extinct, but the other Lord which did not purchase, shall have them, for *Res inter alios acta, nemini nocere debeat*: To which *Coke* cheife Justice agreed, and he said if Harriot custome be due, peradventure it shall not be extinct by purchase of parcell of the Tenancy, for that is personall, and it is not issuing out of land, but for intire services, which are issuing out of land, he said there is no difference betwixt annuall services and casuall services which are intire, and so he concluded, as above.

*Coke* cheife Justice accordingly, and he said there is no difference between annuall intire services and casuall, so that they are services to be paid at the death or alteration of every Tenant, or otherwise, but he said there is no doubt, but that Rent service shall be apportioned, though that the Lord purchase parcell, be that

in

in the Kings case, or of a common person, and this by the common Law without the aid of any *Statute*, for there is not any *Statute* that shall aid that, if it be not remedied by the Common Law, and he said that some Intire services may multiply, as if a man holds by payment of a payre of gilt Spurs, or of a Hawke, or a Horse, or others such like, and makes a feoffment of parcell, the Feoffee shall hold by the same intire services: But if the Tenant hold by personall services, as to cover the Table of his Lord, or to be his Carver, or Sewer at such a Feast, or such like, these personall services cannot multiply, if the Tenant makes a feoffment of part, for by this the Lord may be prejudiced, for peradventure at his house he will not include them, but he may distrain every of them to make the service: And he saith the reason for which Knights service shall be apportioned, is for that it is for the publick good, and for the good of the Common Wealth: But so are not the other personall services, and in the principall case he conceives, that if the Tenant had made a feoffment first to a stranger, and after the stranger had infeoffed the Lord, that by that all the intire service shall not be extinct, for by the feoffment of the estranger, was severence of the services, and he holds by a Harriot as well as his Feoffor, and for that nothing shall be extinct, but the Harriot due by that parcell, of which the estranger was infeoffed; and he agreed with *Walmesley*, that a Harriot custome shall not be extinct, where the custome is that every Tenant shall pay a Harriot, for there it is paid in respect that he is Tenant, and custome shall not be drowned by unity of Tenancy and Signiory: And for that he concluded that the Harriot for that, that it was intire service though that it were casuall and not annuall, that yet it shall be extinct, and Judgement was given accordingly.

Hillary 7. Jacobi, 1609. In the Common Bench.

Michelborne against Michelborne.

Trade with Infidels without Licence.

UPON a motion made for confutation upon Prohibition awarded: It was said by the Lord *Coke*, that no Subject of the King, may trade with any Realme of Infidells, without licence of the King, and the reason of that is, that he may relinquish the Catholick faith and adhere to Infidelisme, and he said that he hath seen a licence made in the time of *Ed. 3.* where the King recited that he having speciall trust and confidence that his Subject will not decline from his Faith and Religion, licenced him

(24)

*ut supra*) And this did rise, upon the recital of a licence made to a Merchant to trade into the *East Indies*.

Hilary 7. Jacobi, 1609. *In the Common Bench.*

Read against Fisher.

**I**N debt the Defendant exhibits his suit in the Court of Requests, and there the Plaintiff in that Court denied, that the debt was paid, and the Court of Request awarded an Injunction, and upon Information of that, this Court awarded a Prohibition to inhibit the Suit there.

*Prohibition to the Court of Requests.*

Hilary 7. Jacobi, 1609. *In the Common Bench.*

Mors against Webbe.

**I**N *Replevin* the case was this; A man was seised of two Virgates of Land, and prescribed that he and his Ancestors, and all those whose Estates he hath in the said Virgates of Land, have used to have common in the feilds, &c. That is, when the feilds are fallow all the yeare, and when they are sown with Corn or otherwise severall, when the Crop is mowed and removed, for two Horses, four other Beastes, and a hundred and twenty Sheep, as appertaining to the said two Virgates of Land: The Defendant traverseth the prescription, and upon this they are at Issue, and the Jury found that there is such prescription: But further they say, that the Plaintiff made a Lease of six Acres parcell of the said two Virgates of Land in one of the feilds of, &c. with the Common of that thereunto belonging for the Terme of ten years, and the Beastes for which the *Replevin* was brought, were in another feild of, &c. And if the prescription be suspended or remains, they praied the advise of the Court, and it was agreed that common appendant and appurtenant was all one to the severance, for if such a Commoner grant parcell of that Land to which the Common is appurtenant; or appendant, the Grantee shall have Common, *Pro Rata*, but if a commoner purchase parcell of the Land, in which he hath Common appurtenant, that this extincts all his Common: And it was agreed that Common may be appendant to a Carve of Land, as it appeares by the 6 *Ed.* 3. 42. and 3. *Affise* 2. as to a Mannor, but this shall he intended to the Demesnes of the Mannor, and so a Carve of Land consists of Land, Meadow, and Pasture, as it appeares by *Tirringhams* case 4. *Coke* 37. b. And Common appendant shall not be by prescription, for

*Approvement of Common.*



then the Plea shall be intended double; for it is of common Right, as it appeares by the *Statute of Morten* chap. 4. And the common is mutuall, for the Lord hath Right of Common in the Lands of the Tenant, and the Tenant in the Lands of the Lord: And it was urged by *Nicholls* Serjeant, that the Common shall be apportioned as if it were Rent, and that the Lessee shall have Common for his Lease, and then the Lessor hath no Common appurtenant or appendant to the two Virgates of Land, and for that the Prescription was not good.

*Coke* cheife Justice, if it had been pleaded, that he had used to have Common for the said Beasts Levant and Couchant upon the said Land, there had been no question but it should be apportioned, for the Beastes are Levant and Couchant upon every part, as one day upon one part, and another day upon another part, and for that extinguishment or suspension of part shall be of all, as if a man makes a Lease of two Acres of Land, rendring Rent, and after bargaines and sells the reversion of one Acre, there shall be an apportionment of the Rent, as well as if it had been granted and attornment: And he agreed that if a man have Common appurtenant, and purchase parcell of the Land in which he hath Common, all the Common is extinct, but in this case common appendant shall be apportioned for the benefit of the Plow, for as it is appendant to Land, Hyde, and gain: And in the principall case there was common appendant, for it was pleaded to be belonging to two Virgates of Land, and for commonable Beastes: And he conceived also that the prescription being as appertaining to such Land, that this shall be all one, as if it had been said Levant and couchant, for when they are appurtenant, they shall be intended to Plow, Manure, Compester, and Feed upon the Land: And also he conceived that the right of Common remains in the Lessor, and for that he may prescribe, for after the end of the Tearme shall be returned, and in the intermin he may Bargain and sell and the Vendee shall have it, and shall have common for his Portion.

*Walmesley.*

And *Walmesley* Justice agreed to that, and that during the Tearme the Lessor shall be excluded of his Common for his proportion.

*Foster.*

*Foster* Justice agreed, and that the possession of the Lessee is the possession of the Lessor, but he conceived when the Lessor grants to the Lessee six acres of Land in such a feild where the Land lies, and then the Beasts were taken in another feild: And so they agreed for the matter in Law, and also that the pleading was ill, and so confesse and avoid the prescription: But upon the traverse

as it is pleaded, the Jury shall not take benefit of it, and Judgement was given accordingly.

*Termino Pasche 7. Jacobi 1609 In the Common Bench.*

**T**HOU art a Jury man, and by thy false and subtile means hast been the Death and overthrow of a hundred men, for which words Action upon the case for slander was brought, and it seemed to Coke chiefe Justice that it did well lye, if it be averred that he was a Jury man, and so of Judge and Justice, for *Sermo relativus ad personam intelligi debet de qualitate persone*, as Bracton saith, and in the like Action brought by Butler, it was not averred, that he was a Justice of Peace, and resolved that an Action upon the case doth not lye.

*Action upon the Case for Slander.*

But *Walmesley* Justice conceived that an Action doth not lye, for one Juror only doth not give the Verdict, but he is joyned with his Companions, and it is not to be intended that he could draw his Companions to give Verdict against the truth, and false and subtile means are very generall.

*Warburton* Justice agreed with Coke, and conceived that the Action well lies, being averred that he was a Jury man, as if one calls another Bankrupt Action well lies if it be alledged that the Plaintiff was a Tradesman, and it is common speaking that one is a Leader of the Jurors, and a man may presume that other Jurors will give Verdict, and may take upon him the knowledge of the Act.

*Bankrupt actionable.*

*Walmesley* conceived that the Action did not lye, for that the words are a hundred men, which is impossible, and for that no man will give any credit to it, and for that it is no slander, and for that Action doth not lye, no more then if he had sayd that he had kild a thousand men, But Coke, *Warburton*, *Daniell*, and *Foster*, agreed that the number is not materiall, for by the Words his malice appears, and for that they conceived that the Action doth well lye.

*Pasch. 7. Jacobi 1609. In the Common Bench.*

Denis against More.

**A**ntibony Denis Plaintiff in Replevin, William More Defendant, the case was this, Two joynt Lessees for life were, the Remainder or Reversion in Fee being in another person, he in Reversion grants his Reversion, *Habendum*, the aforesaid Reversion, after the death, surrender, or forfeiture of the Tenant for life, it hapneth,

*Grant of Reversion.*

that the Lease determines, for the life of the Grantee, and Remains to another for life, and resolved that this shall be a good grant of the Reversion to the first effect of Possession, after the Deaths of the Tenants for life, according to the 23. of *Eliza. Dier* 377. 27. And it shall not be intended to passe a future interest, as if it were void of the other party, and so was the opinion of all the Court, see *Bucklers case* 2. *Coke* 55. a. and *Tookers case* 2. *Coke* 66.

Error in Proclamation.

Upon a Fine the first Proclamation was made in *Trinity Term* 5. *Jacobi*.

And the second in *Michaelmas Term* 5. *Jacobi*.

And the third in *Hillary Term* 6. *Jacobi*, where it should be in *Hillary Term* 5. *Jacobi*.

And the fourth and fifth in *Easter Term* 6. *Jacobi*.

Forfeiture of Office of a Chirographer.

And this was agreed to be a palpable Errour, for the fourth Proclamation was not entered at all, and the fifth was entered in *Hillary Term* 6. *Jacobi*, where it should have been in *Hillary Term* 5. *Jacobi*, and it shall not be amended, for that it was of another Term, and the Court conceived that this was a forfeiture of the Office of the Chirographer, for it was an abusing of it, and the Statute of 4 H. 4. 23. and *Westminster* 2. Are that Judgement given in the Kings Court shall stand, untill they be reversed by Errour.

Release.

A man is bound in an Obligation dated the third of *January*, and by Release dated the second day of the sayd Moneth of *January*, releases all Actions, &c. From the beginning of the World untill this present day, and delivered the Release after he had delivered the Obligation.

And *Coke* cheife Justice conceived, that a Release of all Actions untill the Date, shall not discharge duty after, but a Release, *Usque confessionem presentium*, that discharges Duties after the Date, and before the Delivery: But he conceived that the Day of this present time shall be the Day of the Date, and it shall not be averred that it was delivered 20. years after, and it shall not wait upon the Delivery of the Deed.

Error in a Writ of Dower.

A Writ of Dower was brought by *Frances Fulgham* against *Serjeant Harris the younger* in this manner, *Precipe*, &c. *Quod*, &c. *Frances Fulgham* Widdow, where the form in the Register (*Que fuit uxor*) and not Widdow, and the words of the Writ are, *Rationabilem dotem Tenementorum que fuerunt Fran. Fulgham quondam viri sui*, and yet it was resolved to be Errour, see the Register, and yet it doth not vary in substance, and 38 Ed. 3. *In re nisi*



mis *sunt*, all one, yet for that the forme in the Register is otherwise: The Justices would not amend it.

John Warren Plaintiff in Trespasse, and *Ejectione Firme* against Cicely Spackman, it was resolved that the admittance of a Copyholder for life was sufficient for him in remainder. *Copy-hold.*

In a Writ of Dower by Mistris Fulgham upon *Ne Unques couple &c.* pleaded, a Writ was awarded to the Arch-Bishop (in the time of the vacation of the Bishoprick of Lychfeild and Coventry) who returned that he had a *Delegate*, which made a Commission to Babington Chancellor of the said Diocesse, to make inquiry, and certificate of the said matter, which have certified that they were lawfully coupled in lawfull matrimony: And adjudged without question, that the return was not good, for the Arch-Bishop himselfe ought to execute it, and *Delegata potestas non potest delegari*, and for that it was ordered that he should amend her Certificate. *certificate of the Bishop.*

See the Statute of 5 Ed. 3. That an Arrest, *Exundo & rediundo*, from celebrating divine service, And it seemed to the Justices, that such Arrest is not lawfull, for he ought to be priviledged rather then a man which comes to any Court, to procecute or defend any suit here. *Minister Arrested.*

Pasche 7. Jacobi, 1609. In the Exchequer.

### The Duke of Lenox case.

IN Trespasse the case was this, the King by his Letters Patents created the Duke of Lenox *Alneger*, and he made his deputy: And the Duke by the said Letters Patents of the King, was to measure all Clothes, and to have so much for every Peece, and to search and to view that if it be well and sufficiently made or nor, and he made his Deputy, which offers to measure, search, and view, certain parcell of Worsted, and demanded the duty due to the *Alneger* for that, and for that, that the owner refused to pay it, he seised certain peeces of Worsted, and kept them, upon which this Action was brought. *Grant of the King of Alnage.*

And Haughton Serjeant for the Defendant, conceived that the sole question rests upon these Letters Patents of the King, and for that he would first consider. *Haughton.*

First if these duties of Subsidies and Aulnage are due by the Common Law, and if they are not due by the Common Law, then

then if they be due by Statute Law: And if they be due, neither by the Common Law, nor Statute Law; then if the King by his *Letters Patents* may grant it.

And to the first he said: That Subsidy is ayd. or help: And there are two manners of ayd; one which is Inheritance in the King, as ayd to make his Son Knight, or to marry his Daughter, and others which are given by grant of others, and these are not Inheritances in the King; and these duties were not demandable by the Common Law, nor by Custome: And this appeares by the 29. *Ed. 3. 6.* Where any prises were demanded which were due by the common Law; and some which were not due: and subsidie for Woollens were not due by the Common Law, but it was granted to the King and is now due, but this is by grant, and not by the Common Law, and in the 14. *Ed. 3.* A Statute was made for the King for his subsidy for Woolles, what part he should have, which part was given to him in quantity; and a time of *H. 6.* A Statute was made by which subsidy was given to him during his life, and 36. *Ed. 3.* Subsidy was granted for three yeares, and after should not be any subsidy paid, as appeares by 45. *Ed. 3.* And if subsidie were not due by the Common Law for Woolles, then may it be concluded, that it was not due for clothes, for Woolles grow without mans labour, and the 11. *H. 4.* and 13. *H. 4.* The King makes a grant of Alnage of clothes, and a Writ is awarded to the Mayor and Sheriffs of London, to give possession to the Patentee, which returns the Writ, that the Office was not granted before this time: And the Statute of 24. *Ed. 3.* was the first Statute that gave profit to the King for clothes: But he granted that the Office of Alneger was of ancient times, and an ancient Office, but it was no Office of profit, but an Office of Justice and Right; and no Fee was due for the exercising of it, and that 1. *Ed. 2.* was a Grant of the Office of the Alneger, and 11. *H. 4.* was a Grant of the Office of Alneger for Canvas, but it doth not appeare by any account, that the King had any profit for the Alnage it selfe, or upon the said Grants, either before or after, and allowing that there were accounts for Cloth, yet it doth not appeare that there were any accounts for Worsted: The Statute of 27. *Eliz.* gives subsidy of four pence for every broad Cloth, so that the Statute made expresse mention of broad Cloth, but there was not any mention of Worsteds, and this Statute shall not be taken by equity, though that the Statute of 1. *R. 2. 12.* for escapes by the Warden of the Fleet, being a penall Statute, yet for that, that it was for a generall mischeife, shall be taken by equity, as it appeares by *Platts Case* in the Comment: So the Statute of 9. *Ed. 3.* chap. 3. provideth that where

where Debt is brought against diverse Executors, that they shall have but one *Essoyn*, and the *Statute* mentions Executors only, yet Administrators are taken within the equity of this *Statute*, as it appears by 3. *H. 6.* yet in this case at the Bar, the *Statute* of 27. *Eliz.* was not for the remedy of a mischeife, but is a Grant to the King, and Grant of one thing cannot be Grant of another thing, as if the King pardon an Offence, another Offence cannot be pardoned by this: As it appears by the Arch-Bishop of *Canterburies* Case, 2. *Coke*, where the *Statute* of 1. *Ed. 6.* by which diverse Chantryes were granted to the King, it shall be intended a Grant within the *Statute* of 31. *H. 8.* of Monastries which was before: But further he said that the matter is insufficient to raise a duty to the King, for in vain is the property of any thing in one man if another man may charge it: And in this case the King cannot grant these Clothes, and for that he cannot charge them, and the *Letters Patents* of the King are not sufficient only to charge the Goods of any man, see the case of 11. *H. 4.* But he agreed that if the King grant a Ferrey, and that every passenger shall pay for his passage four pence, this is good, for every man may chose whether he will passe by that or not: And none shall be constrained to passe by that, but Grant of the King to one, that none shall bring in any Cards into *England* but the Patentee only is void; and it was adjudged in *Nicholls* Case in 18. *Eliz.* That if any man offend in not repaying of a Bridge, the King cannot pardon it, for the Subjects of the King have Interest in that, and further he said, that the Grant was against an expresse *Statute* made in 7. *Ed. 4.* 1. for this appoints that the *Alneger* shall not take any Fee, by which the Grant of the sayd Office shall be without Fee, and this Grant is with a Fee, that is, so much for every Cloth, he agreed that this is an affirmative Law, and for that it shall not bind the King generally, but when it is for determination of right or wrong, the King shall be bound by that, and the Patent is grounded upon the *Statute* of 27. *Eliz.* or 47. *Ed. 3.* 1. which are made for the breadth of Clothes; and here the Patent hath not any respect to it, for if the peece be but of the breadth of a foote, if it be in length according to the *Statute*, so much shall be payd for that as if it were a broad Cloth, and for that there is not any equity in it, that the *Statute* seemes to intend, for the charge ought to be correspondent to the quantity of the Cloth, as 41. *Ed. 3.* 16. Avowry for distresse of sixteen Oxen for nine pence Rent, and adjudged that it was found outrageous, and therefore he was amerced for taking of an excessive distresse, and so he demanded Judgement for the Plaintiff.

*Dodridge* the Kings Serjeant, that the question is if the *Alneger* *Dodridge*,  
ger



ger may meddle with this new kind of Drapery and shall take Fee for that, and it seemes to him that he may meddle with all things, which consists in Measure, Waying, and Searching: And may exercise his Office in this for necessity of Merchandise, for Common Wealth cannot consist without commerce, and *Pecunia est rerum mensura*, and provides to make recompence in value for every thing, as it is said by *Kemble 12. H. 7. 24. b.* and then to reduce all other things in certain, for it is the certain value of money, is known to be a direct meanes to know the quantity of all other things, and that is by waight and measure, &c. And for this for the necessity of commerce, there ought to be a publick Officer, which shall have the care and charge that such things shall be well and duly made, for the profit and benefit of the Common Wealth, and this Officer is as ancient as there hath been any commerce within this Realme, and he made illustration thereof by diverse Rolls of the Exchequer in time of 2 *H. 4.* By which it appeares, that then there were Marts for cloth: And that then was an Officer, to search, measure, and see the said clothes opened, for then was an Officer made of purpose to measure and search the clothes, which were sold in a Faire at *Worcester*, by which Rolls also it appeares, that there was an Assise of breadth and length of clothes before any Statute for that purpose, by the *Statute of Magna Charta*, made 9. *H. 3.* chap. 25. It is provided that *una mensura*, and *una latitudo pannorum tinctorum, russatorum, & Haubergettarum*, that is, *Duo ulne infra listas per totum Regnum Anglie*, and 1 *Ed. 1.* amongst the Rolls of the Patents in the Tower, it appears that the Office of Alneger was granted *De omnibus pannis tam ultra mare quam infra mare*: And 1. *R. 2.* was another Grant of the Office of Alneger, and 14. *R. 2.* the King granted the Office of Alneger in *Ireland*, and by the *Statute of 5. Ed. 2.* it is provided that the estretes by the Warden of the Alnage should be delivered into the Exchequer to the Treasurer of the Exchequer, and 17. *Ed. 2.* the Office of Alneger was granted to one *J. Griffin* of all the clothes made beyond Sea, till the 1. of *Ed. 3.* by which the use appears in the time of the Raigne of King *Ed. 3.* upon which records he observed, that the Office of an Alneger is an ancient Office, and that he hath power to see, search, and measure, *omnes pannas tam ultra marinas quam infra marinas*, without any exception, and for that it cannot be denied, but that he ought to meddle with wollen clothes, and he ought to meddle with all for one selfe same end and purpose, that is to fasten a Seale to them. Secondly, That the Law depends upon the Art and invention of Artists, then no Law shall prevent more mischeifes, for there is no end of Art and Invention. And thirdly, and that in this *Individuo*, for there is not any Invention

vention made of Worsted, till the time of *Ed. 2.* for it was a new commodity, and then first Invented, and after it was first invented, there was immediately an Officer made for that, and for this it appears that *1 Ed. 3. Nicholas Shewerler* was made generall Alneger for that, and after that came *Wadlowes and Sayes*, and also an Alneger was immediately made for them, by which it appears, that so soon as new stuff was invented by the Artift that there was a new Officer to search, and see that, and prevent that deceit should not be used in it, and then for the Fee of the Alneger, that is grounded upon a just Law, which is the Law of *Retribution, for Dignitas est operarius mercede*, and though it doth not appear by their Patents, that they had taken any Fee for the exercising of their sayd Office, yet it appears by their Accounts that they have had a Fee for it, and if they have no Fee of the King, then it follows that they ought to have a Fee of the Subject by Common Law, the Office being for the publick good, and the Patent is, upon which the Duke shall have the sayd Office as hitherto they have had it, and it appears by the *11 of H. 4. 58.* and the *12 of H. 4.* That the King may grant and annex Fee to a necessary Office to be taken of the Subjects, but it was objected that the Alneger had no Fee, and if he had that, he was abridged of: that by the *Statute of 2 Ed. 3. 14.* Where it is sayd that they shall be ready to make prooffe; when they should be required to measure, without taking any thing of the Merchant, but this refers only to the Maiors and Bailiffs of Towns, where such Cloathes shall come, and not to the Alneger, and that the *Statute of 11 Ed. 3. chapter 3.* consists upon two parts.

First, that Clothiers may make Cloth of what length and breadth that they will.

The second, that no Cloth shall be brought into *England, Wales, or Scotland*, but that which is made in them, and then if the Clothiers have such liberty to make Cloath of what length and breadth they will, then there is no need of Alneger: As to that it was answered, that there was need of him to see and search the Goodness of that, as well as the length and breadth, And also the *Statute of 25 Ed. 3. chap. 4.* Provides that all Clothes vendable, which shall be sold whole Cloathes in *England*, in whose hands soever they are, shall be measured by the Alneger of the King, and the *Statute of 27 Ed. 3. chapter 4.* Statute the first, provides that no Cloathes shall be forfeited, though they be not of the same *Assise*, but the Alneger of the King shall measure the Cloath and mark it, with such a mark, that a man may know how much that contains; so for these *Statutes*, and for the reasons aforesaid it appears, that it belongeth to the Office of an Alneger to survey, measure, and marke Cloathes, as well by the Common Law, as by the Statute

Law: It was objected first that the Statute of 27 Ed. 3. limits and appoints that the Alneger should measure broad Cloath, and doth not make mention of any other Cloathes, but broad Cloathes, and for that it seems that he shall not meddle with any other Cloathes, but it appears by diverse Accounts, that he should meddle with Wadlowes and Sayes, and the Statute of the 17 R. 2. chap. 2. Provides that none shall sell any Cloath before that it be measured by the Alneger of the King, and that none shall make any deceit in Kerseyes.

The second Objection that Cloathes of Lesser Assise then halfe broad Cloath, the Alneger shall take nothing by the Statute of 27 Ed. 3. This is intended of Broad Cloath which hath used to be sold, and these be in length above the broad Cloath, and in breadth as Kerseyes, and others were, but as Remnants which have not been used to be sold, no subsidy was due by the Common Law, for that is granted by the Statute of 27 Ed. 3. And in this Grant two things are to be considered.

First, the Statute of 2 Ed. 3. and the Statute made at Northampton, where it was petitioned to the Parliament, that the King would remit the penalties, and the King should have recompence for the loss, and for this the Statute gives subsidy, this was no private gift, but a publick gift, and the reason of this was the retribution of his loss and the King paid for it, and that for this he should have a Subsidy.

Secondly, Wools are the continuall Treasure of the Realm, and let them be of what nature they will they are called *Panni*: And for that when the King hath a settled Inheritance, it is no reason that the slight of an Artist should prejudice the King: And it appears by the Statute of 11 H. 4. 7. that was made to prevent the barrelling of Clothes, and the making of them into Garments, and the transporting of them beyond Sea.

And also the third reason is usage, for all other clothes pay Subsidy, and there is no other Law to charge them but the Statute of 27 Ed. 3. 4. That this subsidy is settled in the King, and no devise of man may divest it, the Statute of 27 Ed. 3. and 47. Ed. 3. Set down and alter the length and breadth of clothes, and yet the Custome remains.

The fifth objection that the Statute doth not extend in equity to a thing which is not in *Rerum natura* at the time of the making of the Statute which is false position, for how can makers of Statutes prevent all mischeifes, *Eaton and Studdes case* Com. Aristotle in *Ethicks liber 5. chap. 10.* saith, that *Equitas est correctio legis generatione lata, quia pars deficit.*

And Bratton in his first Book of new Division Ch. 3. saith, that *Equitas*

Statutes, how  
to be under-  
stood, &c.



*quoniam est veritas convenientia que in paribus causis, paria desiderat iura*  
 & omnia bene coequi parer & diciur equitas quasi equalitas, and for  
 that it is enacted by the Statute of 11 Ed. 1. Alton Burnell for un-  
 derstanding of the Statute, that if prayfers of Goods prayse them at  
 too high a value, that they themselves shall have them at the same  
 price at which they were prayfed, and after another Statute is made,  
 which provides, that lands shall be extended upon a Statute, which  
 is taken to be within the Statute of Alton Burnell, which was  
 made before, and so it appears by Littleton that the Statute of  
 Gloucester provides, that warranty by Tenant by the Curche shall  
 not bind the Heir without Assets, and an Estate tayl was not then cre-  
 ated but it was afterwards created by the Statute of Westminster 2.  
 which was made the 12 of Ed. 2. Yet this Warranty shall not binde  
 the Heire in tayl, and also two objections have been made against  
 the Patent.

First, That it was against an expresse Statute.  
 Secondly, That it did not observe any rate or proportion, pro-  
 portionable to the quantity of the peece, so that he answered,  
 that it is not against any Statute, see 7. Ed. 4. 2. 27. H. 7. 5. H. 8.  
 3. 1. and 2. Phil. and Mary: It is not against any of those, for  
 those provides and ordaines, that there shall be Wardens for the  
 better performance of all things which are to be done by the Al-  
 neger, and doth not deprive the King of any thing given to him  
 by any former Statute, but adds further care and diligence, and  
 whenthere is a Law which adds care and Manher and Forme to a  
 former Law: That doth not abridge and deprive the former Law,  
 of any thing given by thar, and if the Wardens do not do their  
 Office, yet that cannot prevent but that the Alneger may do it,  
 which to him belongeth, as in 1 Ed. 4. 2. For Indentures taken in  
 Sheriffs Turnes, which should be delivered by Indenture to the  
 Justices, yet the Justices may proceed, though they be not de-  
 livered by Indenture, and so it is in 43. Ed. 3. 11. The Sheriff  
 ought to array his Pannell four daies before the taking of that, and  
 adjudged that if he doth not, it shall be an error in 42. Ed. 3.  
 Affse 22. and so the Statute of 5. and 6. of Ed. 6. provides that  
 the Mayor appoint to viewers and searchers, this doth not abridge  
 the power of the Alneger for this is but an addition of greater  
 care and diligence, and by the Statute of 29. and 43. Eliz. If upon  
 a search they find any forreiture, they shall have it, but if they  
 do not find the Alneger may find it, and then the King shall have  
 it.

And to the Second he answered, that true it is for every 64. of  
 clothes, the Alneger ought to have foure pence, for his fee,  
 and though that some peecees of cloth are more broade then others,

yet the labour of the Alneger to measure them is all one: So he concluded, and demerred Judgement for the plaintiff.

Hillary 7. Jacobi, 1609. In the Common Bench.

Rutlage against Clarke.

Account.

**I**N Account the Plaintiff declares, that the Defendant hath received of his money by the hands of a stranger to give an account: The Defendant pleades in Bar, that he received to deliver over to a stranger, the which he hath done accordingly, without that, that he received it to make any of account, otherwise then in this manner, and it was resolved that the Plea in Bar was good without traverse, for when he received the money, he is to deliver it over, or to give an account of it to the Plaintiff, so that he is accountable Conditionally, but the traverse is repugnant to the Plea, though it be otherwise, or another way, against the Book of 9. Ed. 4. 15 See 41. Ed. 3. 7. 1. Ed. 5. 22. H. 6. 49: 21. Ed. 4. 4. 66. 1. Ed. 5. 2. that it is a good Bar without traverse: But Brooke in abridging the case of 21. Ed. 4. 66. in Title of account, saith, that it seemes that the traverse ought to be without that, that he was his receiver in other manner, and there and in the Book at large are, that Justices, that is, Coke, Nels, and Vawser against Bryan, that it ought to be traversed: But here in the principall case, it was adjudged that the traverse made the Plea ill.

Hillary 7. Jacobi, 1609. In the Common Bench.

Dummoles against Glyles.

Devise of a  
Tearme.

**T**HE case was this: Grand-Father, Father and Son, the Grand-Father was possessed of a Tearme for two and twenty yeares to come, devised to the Son the Land for one and twenty yeares, and that the Father should have it during the Mynority of the Son, and makes the Son his Executor and dies, the Son being within the age of one and twenty yeares, the Father enters into the Land, and makes a Lease for seven yeares by Indenture, untill the Son came to full age, the Father makes his Son his Executor and dies: The Son enters by force of the devise made by the Grand-Father: And the question was if the Son shall avoid the Lease made by his Father, and it was agreed that he might, in prooffe of which a Judgement was cyted which was in the Kings Bench, Mich. 5. of Eliz. Rex. 459. or 499. In the Priorese of Ankareffe Case, where a  
Tearme

Tearme was devised to one, and if he died within the Tearme, then to such of the Daughters of the Devisor, which then should not be preferred, the Devisor dieth; the Tearme was extended for the Debt of the first Devisee, and then he died, the extent was avoided by the Daughters not preferred, and they grounded their Judgement upon the former Judgements in *Welshen and Eltington* case, and *Paramores and Yardleys* case in the *Comment.* and for that the Law intends that a Devisor is *Inops consilij*, and for that his devise shall have favourable construction according to his intent appearing within the devise, and it was said by *Coke* that in many cases, a man may make such an Estate by devise, that he cannot make by an Act executed in his life time, as it was adjudged in *Graveners* case, where a man devises his Lands to his Executors for payment of his Debts, that there the Executors have Interest, that there the Executor or Executors shall have that, and such Estate cannot be executed by Act in the life of the Devisor, and so it was concluded by them all, that the Son shall avoid the Lease made by the Father, for the Devise was Executory, and doth not vest till the full age of the Son, and then Executor, and shall avoid all Acts made by the Father, by which Judgement was given accordingly.

Freeman against Baspoule, See 9. *Coke* 97. b.

THE case was this; *A.* was indebted to *B.* and they both died, the Heire of *A.* for good consideration, assumed to the Administrator of *B.* that he would pay to the said Administrator the said Debt, and for the not payment of that, according to the Assumption the Administrator after brought an Action, and then the said Heire and the Administrator submitted themselves to the award and arbitrement of *C.* and became bound one to the other, to stand to the award accordingly, so that the said Arbitrator makes his award of all the matters and controversies between them before such a day, *C.* the Arbitrator before the day recyted the Assumpsit, and the debt as aforesaid, and agreed that the Heire should pay the Administrator so much money, and that published according to their submission: And in Action upon the case, *Nullum fecit Arbitrium* was pleaded, and upon demurrer, it was objected that the award was void.

Award.

First, For that it was for one party only, and nothing was arbitrated of the other, and to prove this the Book of 7. *H.* 6. 6. was cited, and 39. *H.* 6. 9. see 2. *R.* 3. 18. b. And this also appears by the pleading of an award, for he which pleades it; that he hath performed all things which are to be performed of his part:

Submission.

And



And that the other pleades performance of all thing which are to be performed of his part, by which it appeares that there ought to be performance of both partes, and by consequence one award to both parties, according to 22. H. 6. 52.

*Arbitrement.*

Secondly, that the award was void, for that, that the submission was of all controversies, so that the Arbitrator delivered his award of all controversies, &c. And there was no award of the said Suit between the parties, and for that he hath not made an Arbitrement of all controversies, and by that the award was void, and to prove that, the Bookes in 4. *Eliz. Dyer* 216. *Punfries* award, and 19. *Eliz. Dyer* 356. 39. and 39. H. 6. 9. Where it is said, that if the submission were of all things, and the Arbitrement of one only, that is a void Arbitrement.

Thirdly, For that it was not limited within the award, at what day, nor at what place the money should be paid by the Heire to the Administrator, and for this cause also it shall be void, for it ought to be paid immediately, and if the Heire cannot find the Administrator, he forthwith hath forfeited his Obligation, and for that in this point it is uncertain, and for that shall be void, as it is in *Sauvour* case, 5. *Coke* 77. b. Where the Arbitrator awards, that one party shall enter into Bond to another for enjoying of certain Lands, and doth not say in what Sum, and adjudged void for the uncertainty, and so in this case by which, &c. But it was answered and resolved, that the Arbitrement was good.

And to the first objection it was resolved, and agreed, that every award ought to have respect to both parties, if it be not a matter which concerne one party only, and neither recompence nor acquittall due to the other party in which case the award shall be good: And it was resolved in the principall case, that the award was made of both parties, for one was to have money, and the other though there was no expresse mention, that the other should be discharged of his Assumpsit, yet the award was a good discharge in Law, and may be pleaded in Bar upon an Action brought upon the Assumpsit, and so it was for both parties.

And to the second objection, it was agreed, that where submission is, with *Ita quod*, &c. as above, that there the Arbitrators ought to make arbitrement, of all the variances and controversies, referred to their arbitrement, and if they do make no arbitrement, of all the matters of which the submission is made, the award is void, but if the submission be generall, as of all matters in variance or controversie between them: There if the Arbitrator makes his award of all matters which are known to him, the award shall be good: As my Lord *Coke* conceived, though that there

there are other matters in variance, of which the Arbitrator hath no notice, as if divers Creditors sue a commission, upon the *statute of Bankrupts*, and an another person to whom the *Bankrupt* was indebted, doth not come in as a Creditor, nor give notice to the Commissioners, that the *Bankrupt* was indebted to him, he shall not take benefit of the commission, for the Commissioners cannot relieve those Creditors of which they have no notice, as it appears by the case of *Bankrupts* in 2. *Coke*.

And to the third objection it was answered and resolved, that the award was good, notwithstanding that no place be expressed where the money shall be paid, for in Law that ought to have reasonable construction, and the party ought to have reasonable time for the payment of that; but *Foster* conceived that it is not good, for it seemed to him, that if the award shall be good, that the Obligation of submission shall be immediately forfeited, for that there was neither time nor place, where the money should be paid, but this was answered with the *Bookes of 3. H. 7. 16. Ed. 4.* Where it is said that if an Arbitrator award that one party shall pay such a sum of money at such a day, and keeps the award in his Pocket till such a day be past, that yet the Obligation shall not be forfeited: And so it was resolved and adjudged by all the other Justices, that the award was good, and Judgement was entered accordingly.

Hillary 7. Jacobi, 1609. In the Common Bench.

Foster against Jackson.

**R**ICHARD Foster Plaintiff in *Scire Facias* against Anne Jackson and Myles Jackson Executors of Thomas Jackson, upon Judgement had against the said Thomas in an Action of Debt: The Defendants pleades that the said Thomas Jackson the Testator was taken upon a *Capias ad Satisfaciendum*, awarded upon the sayd Judgement, and in execution for the sayd Debt, by force of the said *Capias*, and there died in execution, and so demands Judgement, &c. And the sole question was, if the said Testator being in execution for the said Debt by force of the said *Capias*, and there dies, if this be satisfaction of the Debt or not.

Where the death of the Defendant in Execution shall be satisfactory.

And *Dodridge* the Kings Serjeant which argued for the Plaintiff in the sayd *Scire Facias* conceived that it is no satisfaction; but that notwithstanding the Debt remains, for the words of the Writ are, *Capias ad Satisfaciendum*, and all others Executions, as *Fiore Facias*, and *Eligit* are satisfactory: But the *Capias* is but a restraint of his liberty, till he hath satisfied the Debt, and for that

*Dodridge.*

that it is no plenary satisfaction, but only restraint of his liberty, which the Law more respects then Goods or Lands, and for that *Custodia* ought to be *Salva & Stricta*: So by this the party may be Inforced to pay his Debt *Salva*, to the party, so that by this the party may be safely detained, till he hath satisfied the Debt, and *Stricta* to the King, so that by this Justice may be satisfied, and for that *Bracton* saith; that it is only to compell the party to make satisfaction: And it is resolved in the 33. H. 6. 47. That it is no satisfaction, but that the Body should remain as a Pledge, till satisfaction were made, or as return Irreplevisable, and yet neither the one nor the other are satisfaction: And the words of the Writ are *Capias ad satisfaciendum*, the party, but if he will satisfie then there is no reason that the Defendant shall be Imprisoned by the Writ: But if he will not pay, then he shall continue in Prison, *Quousque satisfecerit*, by which it appeares that the Imprisonment is no satisfaction, and it appeares also by the Register, and *Fitz. Na. Bre. 246. b.* That if a man recover Damages of Trespasse, before the Justices of Oyer and Terminer, and hath the party in execution by force of this Judgement, now if the party which is in execution dies in Prison, he which recovered may sue *Certiorari* to the Justices to remove this Record into the Kings Bench, that the Justices there may make upon that Record, as the Law will in such case: And it seemes by this that the party shall have execution by *Elegit*, or by *Fieri Facias*, for it is not reasonable as it is there sayd, that the death of him which died in Prison, shall be satisfaction to the party which recovered: (but *Fitzb.* here saith, *Tamen quere*, for he doubted of that) but in the Register there is a speciall Writ of *Certiorari* to this purpose, that is to remove the Record into the Kings Bench, so that the Justices may do there upon that, as the Law will, and if the Law will not allow the party to have new execution, it were in vain to have such *Certiorari*, for other course cannot be taken, and the end of every suit is to have payment, and so is the Judgement that the Plaintiff should recover his Debt, and so is the Writ, and the count, and the *Capias* also, and to the end of Justices in *Suum cuique tribuere*: And the party hath not any of these ends, if the death of the Defendant in prison shall be satisfaction, and in the 47. Ed. 3. *Fitz.* execution 41. *Persey* said, that if in Trespasse the Plaintiff recover, and the Defendant is taken for the Kings Fyne, if he pray that the Defendant continue in Prison, till he have made agreement with him, perchance he shall not have *Elegit*, and for that being in Prison, he prayed execution of his Body, and had it, but if the party gets out that he hath no execution, that it is not his default, he shall have *Elegit* after

*Certiorari.*



after, for that, that he cannot have his purpose according to his first election. And if any be in this case, then upon that he inferred that the party in this case may have a *Fieri Facias* against the *Executors*. And also it is resolved by the whole Court in the Common Bench, 29 H. 8. B. *Execution* 132. That if two are bound in an *Obligation*, *conjunctim & divisim*, the Obligee impleads one, and hath *execution* of his body, and after impleads the other, and condemns him, hee may have *Execution* against him also, for the taking of the body is good *execution*, but it is no satisfaction, and therefore he may take the other also: but if he have satisfied the *Plaintiffe*, he shall not have *execution* afterwards. And therefore this Order, that the *Plaintiff* upon an *Obligation* shall have but one *Execution* is intended such an *Execution*, which is a satisfaction: See 33 H. 6. 48. b. 4 H. 7. 8. 4 Edw. 4. 38. 5 Edw. 4. 4. 5 Coke 92. *Blumfields* case, resolved by all the Court, that if the *Defendant* in debt dye in *Execution*, that the *Defendant* shall have new *execution* by *Elegit* or *Fieri Facias*, for the death of the *Defendant* is the act of God, which shall not turn the *Plaintiff* to prejudice, as it is said in *Trewynards* case, 38 H. 8. Dyer 60. The *Plaintiff* shall not be prejudiced of his *Execution* by act in Law, which makes no wrong to any. And to the first Objection which may be made against him, that is, That all processe are determined after the party is taken, and in *execution*; to that he answered, that this is where the *Plaintiff* hath satisfactory *execution*, as it appears by 41 Edw. 3. 13. where an action of Account was brought against two, one was out-lawed, and the other comes by the Exigent, and enters in the Court; and he which was out-lawed, obtained his charter of pardon, and for that, that processe was determined against him. And the *Plaintiff* hath chosen to have his action against the other, he prayed that he may be discharged. But it was resolved, that the processe was not determined, nor he which was out-lawed shall not be discharged, till the *Plaintiff* be satisfied, by which it appears that the process is not determined till *execution* with satisfaction. Two other Objections also he endeavoured to answer, that is, that the *Plaintiff* hath determined his election by taking the *Capias*, and that cannot resort to any other Process: and to that he agreed, that where the party hath made such election, that he cannot resort to any other Process, during the life of the party. But if the satisfaction be prevented by the act of God, as in the principall case. But when his person which was the pledg for the debt, and was to remain in prison till the debt be satisfied, is discharged by the act of God, and the *Plaintiff* hath not the fruit of his Suit, nor the Judgement is not satisfied, and the *Plaintiff* hath done all that hee can, and there was no defect in him, it is no reason, but that he may have new processe; and the third objection is a Judgment which was

Outlawry.

given in the Kings Bench, *Pasche 43. Eliz. Rot. 58.* between *Williams* and *Curtis*: And to that he said, that he conceived, that this was a rule for default of prosecution, for the cause was referred to Arbitrement, and so hanged for long time: and so though the Judgment was directly against Law in the principall points, yet for that, that it was not upon solemn argument of the Judges, hee saith it is not to be compared to other authorities by him cyted before, for which he includes, and prayed Judgment for the Plaintiff.

*Hutton.*

*Hutton* Serjeant that argued for the Defendants conceived the contrary, and first he examined how the body of a man cometh subject and lyable to any Execution, and to that he said, that by the Common Law the body was not subject to Execution for the debt of any man, but in accompt only a *Capias ad computandum* lyes, and no other processe in this action, but distresse infinite till the Statute of *Marlbridge*, Chap. 23. and *West. 2.* Chap. 11. *Capias* was given in Accompt; for by the Common Law, the Processe in that was Distresse Infinite as aforesaid, and after by the Statute of 25 Edw. 3. Chapter 17. Such like Processe was given in debt, as in accompt, and before that the body of the Defendant was not lyable to execution for debt, if it be not in the Kings case, as it appeares by Sir *William Harberts* case, 12. a. And upon this he inferred upon the words of the Statute of 25 Ed. 3. Chap. 17. which saith, that such like Processe shal be in debt, as were in accompt: That after the Plaintiff hath determined his election, and taken a *Capias*, that then he is in the same case as if it had been in accompt, and for that he cannot resort to any other Processe. And he said that the words of the *Elegit* and *Fieri Facias* do not differ in substance from the words of *Capias*, for there is to satisfie the party, as well as in the other: And when a man hath made his Election to have *Elegit*, he shall not have other Execution. But when the Defendant hath neither goods nor Lands, Then *qui non habet in are licet in Corpore*, and the Plaintiffe at the first when he hath Judgment hath election to have *Fieri Facias*, *Elegit*, or *Capias*, then he cannot have *fieri facias*; but if he determine his Election at the first, and sue *Elegit* or *Capias*, then he cannot have *fieri facias*, but may first sue *fieri facias*, and after *Elegit* or *Capias*, as it appeares by the 13 H. 7. 15. 14 H. 7. 28. and 7 H. 6. 7. But if it be upon Statute staple, Then he may have execution for his Body, Goods, and Land together, as it appeares by 31 H. 6. 47. *Lynnacres* Case is put in *Blunfelds* case, 5 Coke 92. b. and 15 H. 7. 15. But the reason of this is, that a special Execution by Statute is given in this case. And he agreed, that where a Judgement is given against 2 or 3. and the Plaintiff sue *Capias* against one of them, by that he hath determined his Election: So that if he dye in Prison or otherwise, he may sue another *Capias* against the others, but he cannot sue *fieri facias*,

or *Hegit*, as it appears by 33 *H. 6.* 47. before: and *Blunfields* case, 5 *Coke* 92. b. 4 *H. 7.* 8. And he said that the body is the principall, and becomes chargeable by *Statute*: and it appears by 22 *Affiz.* 43. That when the party is in Prison, that this is adjudged in Law an *Execution* for the party: and further in the Booke of 33 *H. 6.* 47. is but the opinion of *Prisor* and *Lacon*: And the principall case there depends upon another point, *Fitz.* 246. before cyted, is but a *quere*, and *Fitz.* himself doubted of it; and the book of 44 *Edw. 3.* *Fitz.* *Execution*, 41. is but the opinion of *Percye*; But the Judgment upon the principall point is otherwise. And the principall case in *Blunfields* case, 5 *Coke*, was upon another point also, as it appears by the Booke, and so he concluded with the Judgment before cyted to be in the Kings Bench, *Pasche* 43 *Eliz.* between *Williams* and *Cuttris*, which was direct in the point according to his opinion, and prayed Judgment for the *Defendants* in the *Scire Facias*, and it is adjourned.

This Case was argued in *Trinity* Term next ensuing, by all the Judges of the Common Pleas: and first *Foster* the youngest Judge argued, that the death of the *Defendant* in Prison being in *Execution*, was no satisfaction, but the *Plaintiffe* may have a new *execution* against his *Executors*, for he said it was an old saying, *That debts went before deadly sinne*: And that every one ought to satisfy his debts by the Law of God, before Legacies given to charitable uses: And so by the Law of the Realm, if it be not the default of the *Plaintiffe*, as it was not in our Cause; for the death of the *Defendant* in Prison was the act of God, and the *Executors* have confessed by pleading that they have assets, and the *Plaintiff* hath nothing but griefe and pain; and he said as before, that at the Common Law no *Capias* lay, till the *Statutes* of *Marlebridge*, *Chap. 23.* and *Westminster*, the 2. *Chap. 11.* *Capias* was given in Accompt, and then the *Statute* of 25 *Edw. 3.* *Chap. 17.* gives such like Processe in debt which was in Accompt, and then in Accompt *Capias ad Computandum* lyes, and in debt *Capias ad Satisfaciendum*: And if in Accompt the *Defendant* was adjudged to accompt, and *Capias ad Computandum* be awarded, and he taken by force of that, and committed to Prison, and here dyes, a new Writ shall be awarded: So in debt, if the *Defendant* be taken by *Capias ad Satisfaciendum*, new Writ shall be awarded against his *Executors*, see 1 *Edw. 3.* 24. 1 *H. 7.* 5 *Coke* 92. *Blundfields* case; for it is only the default of the *Defendant*, that the debt is not satisfied, and for that it is no reason that the *Plaintiff* should be prejudiced by that: and 11 *H. 4.* 44. and 45. by *Skreene*, Debt upon an Escape doth not lye against the Executor of the Sheriff, but new Processe shall be awarded against the Prisoner which is escaped; for a man shall not take advantage of his own wrong, as in the case of *Littleton*. If the sonne makes disseisin, and enfeoffs the Father, which dyes, the sonne shall

*Foster.*

Debt upon escape against whom.



shall not take advantage of this Discent, because he was *particeps criminis*, and he said it was no wrong to any, if execution were made of the goods of the *Testator*, and it is mischievous to the *Plaintiffs*, for he shall loose his debt: And to the Objections which have been made, that there is an end of Processe when the *Defendant* is taken by *Capias*, and dyes in Execution, the which he agreed as long as the *Defendant* lived, but after his death he may make new election, 47 Ed. 3. *Fitz. Execution* 41. by *Percye*. And it appears by the pleading in 17 Ed. 3. That Judgment & Execution without satisfaction is no Plea in Bar. And also he cyted the Register, 285. and *Fitz. Na. Bre.* 246. 19. Ed. 3. 21 H. 6. 5. where the *Plaintiff* had effectual execution, which was satisfaction, 44 Ed. 3. 21 Edw. 4. 1 Edw. 4. 8 H. 7. 16 H. 7. to the same purpose, for which *Dodrige* cyted them before. And also he said, that the Judges have always had respect to the satisfaction of Debts, and for that would not bayle one in Execution upon a Writ of Errour, where Errour indeed was assigned, but suffers him to remain in Prison till the Judgment were reversed. But here the *Plaintiff* hath neither Bale nor any satisfaction but grieve and pain: And in the 21 of H. 7. the Sheriff returned, that the *Defendant* had no land, but lands in use, and was adjudged that he should execute the *Elegit* upon these Lands, such was the respect that the Judges have to Executions, and to the Case of 35 H. 6. 47. This is but the opinion of *Lacon*, which erred in the principall case, and may as well erre in this point: and his opinion also is so intricately penned, that he cannot understand it: And *Martins* opinion also in 7 H. 6. 7. is against the Judgment of the principall case. And to the Objection, that the Party had determined his Election by the Execution of the *Capias*, he agreed to that with this difference, that is, if the *Plaintiff* sue *Scire facias*, & the Sheriff levied part, that this notwithstanding the *Plaintiff* may have *Capias* for the residue, and so *Elegit* after *Fieri facias*, or *Capias*, for there is not any Entry made of awarding of *fieri facias*, or *Elegit*: But the *Plaintiff* only sued that out of the Court, see 44 Edw. 3. 18 Ed. 4. 31 Ed. 3. 17 Ed. 3. 20 Ed. 2. 22. *Assis.* 17 H. 7. 1. And so he concluded that the Judgment shall be given for the *Plaintiff* in the *scire facias*.

Warburton.

Warburton Justice conceived the contrary, that is, that the *Plaintiff* in the *Scire facias* shall be barred: And he agreed and said, that none will deny, but that Debts shall be paid, but that ought to be according to the rules of the Law: For by the Common Law the body of the *Defendant* was not lyable to execution, and then it is to examine in what cases he is at this day subject to execution: and though in Trespasse *Capias* lyes at the Common Law, but in Debt no *Capias* lyes till the Statute of 25 Edw. 3. which gives the same processe which was in Accompt, and this is as well in the Originall processe,

cesses, as in the Judiciall, and *Elegit* was first given by the Statute of Westminster. 2. And this was of the half of the Land: But *Levari facias* was at the Common Law of the profits of the Land: That in debt Acceptance and Election binds the party, and so this remains; for the said Statutes being in the affirmative, doth not take away that, nor abate it: and by that if Conusee of a Statute accepts Land extended at too high a value, he is bound by that, 22 Edw. 3. 132 H. 6. 15 H. 7. And that when the Party hath Judgment, he hath election to have execution by *Fieri facias*, *Elegit*, or *Capias*, for he hath determined his Election. So if he makes his Election of a *Capias* at first, he cannot have *Elegit* after, 30 Edw. 3. adjudged 32 Edw. 3. Proceffe 52. according, Long 5 of Edw. 4. by Markham and others, and the reason which is given in 47 Edw. 3. 17 Edw. 4. and 21 H. 7. that have been remembred to the contrary is only, that it is reason that the Plaintiff should have the same proceffe which was at the Common Law, and there was not any such proceffe as *Capias* in debt at the Common Law, and 21 H. 7. may be understood that the *Elegit* was not returned, and so no record of that. And 50 Edw. 3. a man may recover in Debt, and pray *Elegit*, and after brings Debt upon the Record, but it doth not lye. And he agreed to the Book of 23 H. 6. For there the Defendant was bound in an Obligation to make satisfaction of Debt, and hee dyed in Prison, and this cannot be satisfaction according to the Condition. And in the Case of Fitz. Nat. Brev. the same doubt of that, and this was the more strong case then the case at the Barr: and if he doubted of that, is the cause that he doubts also. And cyted Williams and Cuttis case, Rot. 88. in the point, where the reason of the Judgment was for that, that the Plaintiff had his plain and full satisfaction, and saith that it was apparent difference between that and Blunfields case, for there was 2 Defendants: and here if one dyes, there shall be no satisfaction, and so these reconciled. And so if a man be taken upon a Statute Merchant, and dyes in execution, that shall not be satisfaction, for this is speciall proceffe given by Statutes. And 14 H. 7. 1. If a man being in Execution escape, he shall not be taken againe: and in the 14 H. 7. in debt upon an Obligation *Capias pro fine* was awarded, and the Defendant taken by that. And the Plaintiff prayed that he might be in Execution for his debt also, and could not, for that he had sued *Fieri facias*, and it doth not appear if the Sheriff have that executed or not. And so he concluded that the Judgment should not be revived by the *Scire facias* against the Executors, and that Judgment shall be given for the Defendants in the *Scire facias*.

Walmesley Justice accordingly. He specially observed the forme of the Writ which suggests, *quod executio adhuc restat facienda*, &c. And to that the Defendants in the *Scire facias* plead that *Capias* was awarded

Land extended  
at too high  
rate.

Walmesley.

sawarded at the suit of the *Plaintiff*, and upon that the *Defendant* was taken in execution and there dyed, by which it appears that the words and suggestion of the Writ was answered directly, and upon that he strongly relyed, and then said that there were 3. ways to have Execution, that is, by *Fieri facias*, *Capias*, and *Elegit*. And there is a special order to be observed in the suing of that, for a man may have *Fieri facias*, and if the *Defendant* have not goods, may have *Elegit*, or *Capias*: But if he make his Election to have *Capias*, he cannot have *Fieri facias*, nor *Elegit*, or if he sue *Elegit*, he cannot have a *Fieri facias*, nor *Capias*: In 33 H. 6. and 44 Edw. 3. which have been cyted, the *Plaintiff* sues *Elegit*, and after that would have sued *Capias*, supposing that he had not accepted the *Elegit*; but of the other part it was said, that the Sheriff had made Execution of it, the which he could not contradict it. And if the *Plaintiff* had *Fieri facias*, and goods delivered to him in Execution, and the Writ returned, he shall not have a second Execution: and so if *Elegit* executed and returned, 14 H. 7. 15 H. 7. and said that Executions are tickle things; for if the party escape, he delivers himselfe out of Execution, and the *Plaintiff* shall not have other Execution against him, for that he hath had one Execution, 2 Edw. 4. And so if a man sues a Writ of Priviledg out of *Parliament*, and by that is delivered out of Execution, he shall not be taken again. And so if a man be delivered upon a Writ of Error, for when the Party hath made his Election to take *proceffe* against the body, it was his folly that he made such Election; for though that death be the act of God, yet for that, that *statutum est omnibus semel mori*, and for that God hath done no wrong, for he hath but performed his Eternall Decree, and for that it is not the act of God only, but the folly of the party to make such Election, and the Book of 47 Edw. 3. by Percy is but his opinion, and more other Books are against that, and 3 H. 6. *Danby* and *Prisor* are against *Lacon*: and though that the death of the Party in Execution is no satisfaction in *rei veritate*, yet in Law it is satisfaction, for that that the party hath no other remedy, the Writ in the Register is *certiorari ad faciendum in omnia & singula que secundum legem & consuetudinem fieri, &c.* And there is not any Law nor Custome to warrant any such Course, and here is not any other proceedings upon it. But if he may have a Writ of *Scire facias ostensus quare satisfactionem habere non debet*, then it may be that the *Defendants* ought to give another answer, but for that, that there is not any such Writ, it seems that Judgment shall be given for the *Defendants*.

Coke.

Coke chief Justice seemed the contrary, and he agreed with *Foster*, and he said, that it is *vexata et spinosa questio*, for the Books vary, and great arguments have been made of both parts. There are three things considerable.

1. *Reasons*,



1. *Reasons.*2. *Authorities.*3. *Answers of Objections.*

And for the *Reasons*: First, he considered in whom the default is for which the Plaintiff shall tote his Debt.

2. That the Debt remains after the body is taken in Execution.
3. If the body taken in Execution be satisfaction.
4. If the dying in Execution be a discharge.
5. The Mischiefs, if so they shall be.

*And to the Objections.*

First, *Escape*, which is the wrong and act of the Party, it is no satisfaction nor discharge, and here is the act of God, and election of the party.

2. *Execution by Elegit*, If Lands be extended upon that, this is no satisfaction. And so if he be delivered by a Writ of Error, and so in this case.

And for the first, the fault was in *Jackson*, for he did not keep his day in the Condition, and upon this was sued, then he pleaded a false plea, and upon that *Judgement* was given against him, in all which actions the default was in the Defendant, and no default in the Plaintiff, for he took the Body which is the visible execution, not in satisfaction, but to satisfy, and the Defendants have not pleaded fully administered, but confesse that they have *Assets*, and there is more reason that the Plaintiff shall be satisfied, then the Executors keep the goods to their own use; for it is *Summa Injustitia nocentem habere totum lucrum, & innocentem totum damnum.*

Second reason was, that it is no satisfaction for the Defendant to dye in Prison, and agreed that if 2 *Precipes* are contained in one Originall, there shall be but one satisfaction. But if one be taken by *Capias*, and remains in Execution, *Capias* shall be awarded against the other, and he shall remain in Prison till satisfaction be had, for execution is no satisfaction, as it is said in 29 H. 8. b. Execution 132. adjudged: See 4 Ed. 4. 38. 5 Ed. 4. 4 H. 7. 8. And *Hillaries* case, 33 H. 6.

And to the third, that is, that the Debt remains after the taking of the body in execution, and agreed that when execution is made of goods or lands, no Debt remains, but otherwise it is of execution of the Body, as it appears by 29 H. 8. before cyted, B. Execution 132. and 41 *Assis.* 29. where a man was condemned in Damages in Trespas, and committed to Prison by *Capias*, and escaped, the Gaoler dyed, the Plaintiff prayed debt against his Executors, and could not have it, for they are not charged without specialty: and the Plaintiff alleadged that the Defendant was vagrant in the County of *M.* and prays *Capias* to the Sheriff of *M.* to take him, and it was granted,

granted, for his remedy against the Sheriff was determined, and this proves also, that the Debt remains after escape, & *Scire facias* is, *licet Judicium redditum sit, tamen executio restat ad hoc faciendam de debito*, for the body is but as a pledg, & the form of the Writ in the Register *Capias ad satisfaciendum*; and not in satisfaction, which proves that there is no satisfaction; but upon the payment of the money his body shall be delivered out of Prison, & this is execution with satisfaction, for there are two Executions, that is, *Medius & finalis*, the first is the *Capias*, the second *Satisfactio*, which is *Ultimus Finis*: And it is a good rule, *quod nihil videtur factum, ubi aliquid restat faciendum*; and here is *aliquid faciendum*, that is, *Satisfactio*, for in all acts there is a beginning, progression, and consummation, & Consummation in this case fails, *Mors est horrendum divortium*, which is the act of God. And when the act of God hath delivered him which lyes in prison for his own default, it is no reason that the Plaintiff should be prejudiced, 43 Ed. 3. 27. A man enfeoffs the Father with Warranty, which enfeoffs an estranger which enfeoffs the son: the father dyes, the son may vouch; for it is the act of God: And to the Mischiefs, *nec crudelis creditor, nec delicatus debitor sunt audiendi*, for they play at Bowls, and keep Hospitality in the Prison: Or if a man be arrested, and makes a tumult, and is slain in endeavouring to break the Prison, and breaks his Neck, it is no reason that he by such act should defraud the Plaintiff of his Debt: the opinions against him are coupled with absurdities, as 7 H. 6. 8. *Martins* opinion is also imparted with absurdity, 33 H. 6. 48. The opinion of *Lacon* is also coupled with another absurdity: and 22 Affis. b. Execution is also coupled with absurdity, that is, if the Defendant escape, this determines the debt, and is satisfaction: and 15 Edw. 3. *Quare Impedit*, 174. in Writ of Right of Advowson, the Plaintiff hath Judgment, and *habere facias sesnam* in the life time of the Incumbent, and after his death sues *Scire Facias*, the first is Execution, but not with satisfaction, and the last is satisfaction, for by this he hath the fruit of his Judgment: So 19 Ed. 3. Execution, 12. a younger *statute* is extended, and *Liberate* sued, executed, and returned: And after an elder *statute* is extended, and after satisfaction of that, he that hath the youngest may sue *Scire Facias*, and have execution of the youngest: So of Beasts distrained, and put into the Pound, and there dye, he which distrayned, may distrayn again, for this is no satisfaction of his Rent, 14 H. 4. 4. 15 Edw. 4. 10. 11 Eliz. Dyer 280 And so *Capias ad computandum* is not Accompt, nor *Capias ad acquierandum*, Acquital, Register, 30. 39. 285. And it is said in *Bract*. lib. 7. Chap. 17. *Sunt brevia Magistralia & firmata*, the first are made by Masters of the Chancery, the others which are Originall by Curators, which are founded by acts of Parliament, and cannot be changed

changed without Parliament; and as Fitzherbert in his Preface to his *Na. Br.* saith, that every Art and Science hath certain Rules and Foundations, to which a man ought to give faith & credence, and the Writ of *Fieri facias* being founded upon a Statute, and the form, that *executio adhuc restat facienda*: he saith that this was the Judgment of the Parliament, that the first Execution was not Satisfaction. But is the Writ is also in the Register, 1496 That where a man is condemned in Treason, and committed to prison, *devenantur quousque*, he saith the party, by this it appears that he is but a pledge: And *Fitz. Na. Br.* 63, 65, 67. and Register: If a man be taken by *Com. Excommunicatum*, *ad satisfactionem et placendum* *Chancery* Ecclesie, and is delivered by Writ, which issues *improvisum*, in such a Writ of *Capias* shall be awarded: And to the matter of Election he agreed, that if Election were awarded, the party cannot have *Fieri facias*, nor *Capias*, for there is Entry made, *quod Electi sibi executionem de mediato*. But when *Fieri facias* or *Capias* is awarded, no entry at all is made. But if any of them are returned executed, then he cannot resort to another Process, and with this difference agrees all the Books of 15. H. 7. 13. H. 7. 14. H. 7. 15. 30. Ed. 3. 23. 24. Ed. 3. 1. 19. H. 6. 4. 3. 4. H. 6. 1. 4. 3. 4. Ed. 3. 1. 19. 50. Ed. 3. 1. 4. and 5. 1. 2. Ed. 3. 4. 1. 2. 3. 4. Ed. 3. 1. 1. 2. 3. 4. Dyer, 206. And to the case of *William and Cuthbert*, cited to be adjudged, in *Elia*, the which he cited to *Lamb*, case, he said in this was done in apparent Error in form of pleading, but that the matter in law cannot come to Judgment, 23. H. 6. 1. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.



of *Case 8. Jacobs v. Bro. Ste. Hillary. 7. Jacobs the beginning.*

## Chalke against peter.

Harris.

**T**His Case was argued this Terme by *Harris* youngest Serjeant for the Defendant, and by *Haughton* for the Plaintiff. And Serjeant *Harris* conceived that *Sir Francis Barrington* was within the Intent of the Act of 13. Ed. 4. chap. 17. For he hath grant of Trees of Inheritance, and this was all the profit which rise upon the Soil, and for that it shall be intended of the Soil it selfe: And to prove that, he cited *Portman and Tardiff's Case* in the Com. 542. and 143. 2. H. 2. xxx. *Crooke* 11. *Eliz. Dyer* 285. Where it is agreed by three Justices, that the Parentee or Grantee of Herbage in a Forrest shall have Trespasse against any which consumes and distroies the Grasse, but not the Trees, nor of the fruit of that; and the Trespasse of that shall be *Quare infrafructu frugis*, as well as if it were of Lard. And may inclose the Forrest by such Grant: See 17. Ed. 4. 6. a. by *Litchard* that *Visitation* doth not pass without Livery: Also admitting that he is not owner of the Ground within the Statute, yet it seems by the Statute that they are: It shall be lawfull for the same Subjects, Owners, &c. And to such other persons to whom such VVood shall happen to be sold: Immediately after the VVood is cut, to fence and inclose the same Ground with sufficient Hedges able to keep out, &c. Upon which words he inferred, that *S. Francis Barrington* is such a Person to whom the VVood is sold, and for that may inclose: And also he conceived, that the Statute is generall, and concerns all persons in generall: and also all Forrests and Chases whatsoever: And for that it is not like to the Cases put in *Holland's Case*, 4. Coke upon the Statute of 13. *Eliz.* VVhich concerns all Ecclesiasticall persons in generall, that this is a generall Act, and yet concerns but one Genus in particular: But the Statute of 1. *Eliz.* is otherwise, which concerns the Bishop, which is but a species of this Genus, as it is resolved in *Elmery's Case*, 5. of Coke: And also he conceived that it shall be relieved by the Statute of 35. H. 8. And so prayed Judgement for the Defendant.

Haughton.

And *Haughton* conceived, that the words of the Statute intend such a person to whom VVood is sold, for one turne only: And not he which hath Inheritance of Wood: & that there is no word in the Statute to exclude Commoner, and such a Vendee is not without remedy, for he is within the statute of 35. H. 8. If he pursue his remedy according to the Statute, and so prayed Judgement for the Plaintiff.

And

And at another day *Foster Justice* argued, that the Plaintiff in the Replegiare shall recover, and said that the cause consists of three parts. *Foster Justice.*

First, the Arbitrement.

Secondly, the assurance.

Thirdly, the private Act of Parliament, of 27. H. 8. And to those the Arbitrement and the assurance shall eye only those which are parties to it, and no others, and the Commoner is not party to that nor shall not be bound, and the private Act confirms the assurance, saving the Right of all strangers, by which the Commoner is exempted, and also the *statute* is made only as confirmation of the Grant, and for that it shall not extend to any other thing, nor to other parties, but those only which are parties to the Grant, as if the Queen had made a voydable Patent, and after had made a Lease for yeares, and after by the *statute* of 18. Eliz. All *Letters Patents* made within such a time were confirmed, this makes the *Letters Patents* good, against the Queen, but against the Lessee: And also all the Covenants in the Grant, extend only to the Lord *Rich* and his Heires, and these which claim under him: And for that it shall not extend to the Commoner, and also the private Act saves the Right of all strangers, by which the Right of the Commoner was saved: And he conceived, that the Commoner shall not be excluded by the *statute* of 22. Ed. 4. chap. 7. which recites, that if any Subjects have any Woods growing in his own Ground, within any Forrest, Chase, &c. Shall cut the same VVood by lycense of the King or his Heires, in Forrest, Chases, &c. Or without lycense in the Forrest, Chase, &c. of any other person, or make any Sale of the same VVoods: It shall be lawfull to the same Owners of the same Ground, whereupon the VVood to cut did grow, and to other such persons to whom the said Wood shall happen to be sold Immediately, &c. to cut and inclose the same Ground, with sufficient hedges, able to hold out all manner of Cattell and Beasts, and to continue the same by the space of seven yeares, without suing of any other Lycense, of him or of his Heires, or of any other persons, or of any their Officers of the same Forrest, Chases, &c. By which words it appears, that the *statute* doth not extend to any Wood of the King, but only to the Wood of the subject lying in Forrest of the King, or of other person owner of the Forrest, or Chase: And if it be in the King's case, and he hath lycense from the King to cut the Wood, then may he cut it without other lycense, according to the perclose of the Act: And the *statute* doth not give lycense to Inclose, without the assent of the Commoner, but without other lycense of other Officers of the Forrest: And by this *Statute* the Owner of the Ground, may first cut the Wood, and then Inclose: But by the *Statute*

tute of 35. H. 8. Otherwise it is, for by this he may first inclose, and then put within four Months; and that Sir Francis Barrington hath no interest in the Soyle, and that this Statute of 22. Ed. 4. is a private Statute and ought to be pleaded, for it concerns only forests and Chases, and it is no other, then if it had been of al Woods in Parks, and resembled that to the Statute of 3. Eliz. of the Bishop, which concerns only the Bishop, and it is resolved in *Elmers* case to be private; and the same Judges shall not take notice of that without pleading, and it is not like the Statute of 12. Eliz. which concerns al manner of spiritual persons in general, and also that this Statute is repealed by the Statute of 25. H. 8. which is a negative Law, and *Leges posteriores priores contrarias abrogant*, and it is agreed in *Porters* case 1. Co. and so he concluded that Judgment should be given for the Plaintiff. Warburton Justice to the contrary, and yet he agreed that neither the Arbitrement, nor the conveyance, nor the private act, excludes the Commoners for these reasons, which have been urged by *Esler*, but he relyed only upon the Statute of 22. Ed. 4. and to that he said that the Statute gives power to the owner of Ground to inclose, and it should be frivolous for him to inclose, if the Commoner shall not be by that excluded, and he said that the persons mentioned in the Statute are two.

The first is the owner of the ground, and such person he agreed Sir Francis Barrington is not. The second is such person to whom such wood shall happen to be sold, and such Person it seems, is Sir Francis Barrington and yet he agreed that he hath an Inheritance in the Trees, and the Owner of the soyl cannot cut them, nor dig the soyl from the Roots of the Trees, for then the Grant could not take effect, and he said there is no difference between sales of Wood, though that the Statute speaks of the Person to whom Wood shall be sold, and another person to whom it shall be given without consideration and to that he resembled the Statute *Westminster* 2. Chap. *Si quis alienavit terram uxoris sue, non deferretur, &c. sed expellet emptor, &c.* though that the Statute mention buyer only: yet Donee without any consideration shall be intended in it, and that the Statute doth not intend within it, and that the Statute doth not intend sale *Vinea vinearum*, but rather sale of Inheritance, for such Vender may rather intend the preservation of the wood then the other: And he inferred upon these words of the Statute, to inclose the same Grounds with hedges sufficient to keep out al manner of Cattel and beasts out of the same Grounds, and these words expound themselves, for they shall not be intended Deer, but Cattel which belong to Commoners, and loss the Statute of *West.* 2. Chap. If Infant suffer Usurpation, this shall not bind him, but this shall be intended, where he hath Advowson by descent



discent and not by purchase, and this appears by the words of the *statute*, which are, *Com aliquis vix presentandi non habens presentavit ad aliquam ecclesiam, cuius presentatus sit admissus, ipse qui verus est patronus, per nullum aliud breve recuperare potuit advocacionem quam per breve de re. Et quod debet perminare per duellum vel per magnam assisam per quod heredes infra etatem existentes per fraudem et negligentiam custodis multas ex hereditatem patiebantur, &c.* By which words it appears, that there ought to be presentation, which passeth by fraud and negligence of the Guardian, which the *Statute* remedies, and that is presentation which he had by discent, and not by purchase, and in the Time of *Ed. 1. Fitz. trespass* 239. It is said, the Law of the Chase, that none may inclose his own Wood, without the view of the Forrester, and if the *Statute* of 22 *Ed. 4.* Gives licence to inclose, and that notwithstanding the Commoner may put in his Beasts, then is the *statute* made in vain; and it is resolved in the 30 of *Ed. 3. Fitz. trespass*, that if a man hunt in a Park or Chase, that this is not within the *statute* of *Westminster 1. Chap. 21 Ed. 1.* So the *statute* of 22 *Ed. 4.* Extends to the Kings Deern, and also to other Beasts, which shal be intended the Cattel of the Commoners, and it is not repealed by the *statute* 35. *H. 8.* For these *statutes* are made for several purposes, and consist upon several grounds, and if the *statute* of 22 *Ed. 4.* be repealed, then there cannot be inclosure in forrest or Chase at al: And which is general Law, and the Justices ought to take notice of that without pleading, and that al lawes to some respects may be intended to be special as the *statute* of 13 *Eliz.* Concerns only spiritual men, and so *Charia de foresta*, concerns only forrests, and the *statute* of 3 *H. 7. Chapt. 1.* Gives appeal to the Wife for the death of her Husband, and though that al these *statutes* concern one thing only, and for that to some intent may be said to be special, yet they are al generall Laws, and so he concluded that Judgment shal be given for the Defendant.

*Walmesley* agreed with *Fosser* in al, that is, that Sir Francis Barington hath nothing but profit, *In alieno solo*, and for this cause was not within the *statute* of 22 *Ed. 4.* Which might inclose, and the Common Law doth not exclude the Commoner, for the Lord Rich granted the Wood, and this *Transit cum onere* to Sir Thomas Barington, and sayd, that it was in vain to dispute if the *statute* of 22 *Ed. 4.* was private Law, or if it were repealed, which makes nothing in the Case, and so he briefly concluded that Judgment shal be given for the Commoner, which is the Plaintiff.

*Coke* chiefe Justice agreed, that Judgment shal be given for the Plaintiff, and did agree that the Arbitrement, the Convaiance, nor the private Act made nothing in the Case, for by these the Commoner cannot be barred of his Common; but for the *statute* of 22 *Ed. 4.*

He

*Coke.*

Charta de Fo-  
resta.

He would first consider how the Law was before the making of that, and as to that it appears by the *statute* of *Charta de Foresta*, that by the Common Law, no man which was Owner of Wood in which another had Common; that they could not inclose, but *Affise* of Common or action upon the case lyeth, as it requires, and if it be several Wood within the Kings Forreſt, in which none hath interest of Common, then may he inclose by the view of the Forreſters, and this hold inclosed by the space of three years, as it appears by the *Preamble* of the *Statute* of 22. Ed. 4. *Cum parvo fossato & bassabasia*, that is a Little Ditch, and Low Hedge, for that the Kings Deare are not shut out, and this appears in the Register, in the Writ of, *Ad quod damnum, Fitz. Na. Bre. 226. f.* And then comes the *statute* of 22. Ed. 4. and gives power to inclose with such sufficient Hedges able to keep out all manner of Beasts and Cattel. And then considered between what persons the *statute* is made: And to that he conceived it is made between the King and his Successors of one part, and Subjects having woods growing upon their owne Grounds, and such persons unto whom such woods shal happen to be sold of the other part; and a Commoner is not named in the *statute*, and also the Body of the *statute* is not general, but there are some words in one sentence, and this is but a sentence and cannot be divided; the words are,

First, The sayd Hedges so made, may keep, &c.

Secondly, And repaire and maintain them, as often as need shal be, within seven years.

Thirdly, without suing any other License of him (that is the King) or his Heirs or other persons (that is, which have forreſts or Chafes) or any of their Officers, and here the sentence concludes, and there is no period before them, so that this *statute* being made between the King and owners of forreſts and Chafes of one part, and Owners of woods in their own soyl, and other persons to whom such woods should be sold of other part, this shal not extend to othes persons, Commoners, and it is like to the case in 9 *Ediz. Dyer* 257. 13. A man makes a Lease for years, and covenants that the Lessee shal enjoy the Term without eviction of the Lessor, or any claiming under him, if he be evicted by a stranger, this shal be no breaking of the Covenant, for a stranger is no party to the Deed, nor claims under the Lessor, and for this his Entry shal not give Action to the Lessee, and so is the Case in 21 H. 7. between the Prior of *Castleton* and the Dean of *Saint Stephens*, which was adjudged the 18 of H. 7. *Pasch. Rot.* 416. Though that no Judgment be reported, where it appears that the King Ed. 3. seised all the Lands of Priors aliens, in time of War, for that that they carried the Treasure of the King out of the Realme to the Kings Enemies, and so it was made by H. 4. also during the time of his Reign, and then in the second year of the

the Reign of King H. 5. by a *statute* made between the King, and the sayd Priors alone, all the Possessions of the sayd Priors were resumed into the hands of the sayd King, and adjudged in 21. H. 7. 1. before that this shal not extend to the Prior of *Castleton*, which had Annuities issuing out of the Possessions of the sayd Priors, for the said Prior of *Castleton* was not party to the sayd act of Parliament, and for that he shal not be prejudiced by that, and so it was adjudged, 25. and 26. Eliz. In the Court of VVards in the case of one *Boswell*, where the King made a Lease for years which was voydable, and after by another Patent granted the Inheritance, and then came the *statute* of 18. Eliz. to confirm all Patents made by the sayd Queen within her time, and adjudged that the sayd Act shal not make the sayd patent voyd to the Patentee, which is a stranger to the act of the Parliament, but only against the Queen, her Heirs and successors, for by the *statute* it is made only against one person only, and shal not be good against another, though there be no saving of such person in the sayd Act. And also he conceived that the *statute* of 22 Ed. 4. Doth not extend to any woods in forrest, in which another hath Common, for it doth not extend only to such woods which a common person hath in the Kings forrest, or common person, and that it may be inclosed for the space of three years after the cutting of the wood in this, before the making of the sayd *statute*, and this was no wood in which an Estranger had Common, as it appears by the *Preamble* of the sayd *statute*; and then after in the sayd *statute* it is sayd, such woods may be inclosed.

And also he conceived where the *statute* sayth, that they may inclose the same Grounds, with such sufficient hedges, able to keep out all manner of Beasts and Cattell out of the same Grounds, but this refers to the quality of the hedge, for before it ought to be a small Ditch, and by this *statute* it ought to be with such hedg which shall be able, &c. And it shall not be referred to the manner of the Cattell: But for the difference between Beasts of Forrest, Beasts of Chase, and Beasts of Warrain, see the Register, fol. 96. 43 Ed. 3. 13. 18. H. 8. 12. b. *Hollinsheads Chronicle*, fol. 20. b. 32. And he conceived that Sir *Francis Barrington* is such a Vendee of Wood, that is within the *statute*, though that he be Vendee of Inheritance, and hath a greater Estate then *Unica vice*, but for that, that he conceived that it was not within the *statute* for other reasons before cyted, he would not dispute it: But he conceived if this had been the question of the Case, that this was within the *statute*, and also he conceived that this was a generall *statute*, of which the Judges shall take notice without pleading of this; And this reason was, for that that the King was party to it, and this which concernes the King, being the head, concernes all the Body and Common Wealth, and



and so it was adjudged in the Chancery in the case of *De Jeseu Hute*; that the Statute by which the Prince created *Peints of Wales* was a general Statute, and for that see the Lord *Barkley's* case in the *Commentaries*. Also he conceived, that the said Statute of 12 of *Ed. 4.* was repealed by 35. *H. 8.* for this was in the Negative; that none shal cut any wood, but only in such manner as is prescribed by the said Statute, and for that shal be a repealer of the first, and that by the first Branch of the said Statute it appears, that if such giving of Wood in his own Soil within any forrest, be cut to his own use, he cannot inclose, and by that Branch Commoner is not excluded, but by the second Branch it is provided, that he may inclose the fourth part of his Wood, and cut that in such manner as is appointed by the said Statute, and then he shal loose his own Common, in the three other parts, and so he concluded that Judgment ought to be given for the Plaintiff, which is the Commoner, and Judgment was entered accordingly.

*Pasc. 1610. 8. Jacobi, in the Common Bench.*

*Cesar against Bull.*

*Assise Office.*

**T**HE Plaintiff in *Assise* against *Emmanuel Bull*, for the Office of *Glocke-keeper* to the Prince, & this he claims by grant of the King during his own Life, with the fee of two Shillings a day for the exercising of it, and three pound yearly for Livery, and the payment purports only the Grant of the Office, and not words of creation of the Office, as *Constitutum officium*, &c. And the Plaintiff could prove that it was an ancient Office, and for that was notwithstanding in the *Assise*, though that the Tenant had made default before.

*Pasc. 1610. 8. Jacobi, in the Common Bench.*

*Heyden against Smith and others.*

*Trespasse.*

**T**HE Plaintiff counts in *Trespasse* against these Defendants, and these Defendants justify as Servants to *Sir John Leventhorp*, who was seised of a free hold of Land, in which the Tree, for which the action was brought, was cut, and so demands Judgment if action, the Plaintiff replies, that the place where, &c. was parcel of a house and twenty Acres of Land, which time out of mind, &c. have been demised and demiseable by Copy of Court Roll, which was parcel of the Manor of &c. of which the said *Sir John Leventhorp* was seised in his Demaine as of fee, and by Copy at a Court held such a day

day and year granted the said Messuage and twenty acres of Land, whereof, &c. To the Plaintiff and his Heirs, according to the custome of the said Mannor, and prescribes that within the sayd mannor was a Custome that every Copy-holder may cut the boughs of all the Pollingers and Husbands growing upon his Copy-hold for fire to be burnt upon his Tenement, and also prescribed for House-boot, Plow-boot, and Cart-boote, and averred that he had nourished the growing of the Trees upon his sayd Copy-hold, and that the sayd Messuage and buildings, upon that were ruinous, and the Trees growing upon that twenty Acres of Land were not sufficient for the repairing of it, and so demanded Judgment if he should be debarred of his Action, upon which these Defendants demurred in Law, and it was adjudged by Coke, Warburton, and Foster, Daniel being absent, that the Action was wel maintainable; against Walmsley who objected, that if a Copy-holder may cut Trees, as it was here pleaded at his pleasure, without pleading first that his House was in decay and ruinous, and that then he cut trees for the repaire of that, that then he hath an Estate at wil according to the Custome, and not at the Wil of the Lord, and he sayd that he could not cut a tree, and imploy that for Reparations twenty years: But the cause of this cutting, which is the Ruines, ought to precede the cutting; and he sayd that such Copy-holder hath no property in the Trees, by such prescription, no more then he which hath Common of Estovers, or tenant at wil, and if he cut a tree without special custome, he shal be punished in trespassse, as Littleton saith of Tenant at Wil, and also he ought to plead how the House was ruinous, and what place and what part of that was in decay, and then that this so being in decay, that he cut trees for the repaires of that, and also that the Prescription to cut off the boughs, *Pro ligna combustibili*, is not wel pleaded, for by that he may cut all the timber and others also, and he who prescribes to hate Estovers, ought to prescribe to have reasonable Estovers for Fuell, and the averment that all the trees are not sufficient for reparations is surplusage, and so hee conceived that the Action for these causes is not maintainable, that is, that it is not maintainable, without speciall custome, and that the custome as it is pleaded here is voyd, but it was answered and resolved, by Coke and the other Justices before cited, that the Action was wel maintainable at the Common Law without such Custome, and that the pleading of the custome was surplusage, for it was agreed that the Copy-holder hath special property, and the Lord a general property; and it was sayd by Coke and Foster, that the Lord may as wel subvert the Houses as cut down the Trees, for without them the Copy-holder hath no means to repaire that, and for that if the Lord cut the Trees, the Copy-holder may take them for repaire of his house,

Estovers.

Boote, its signi-  
fication, &c.

for the Copy-holder hath as large an Estate in the ~~soyl~~ <sup>soyl</sup>, as in his Copy-hold Land; and it was resolved that the Prescription was very well pleaded, inasmuch that the Copy-holder pleads that as a custome, and also that prescription, *Pro lignis combustibilibus* is Good, and this is an apt word by which he may claim it, and that boote in any sense is maintainable, and in some sense is Recompence or Reparation, and it is Houle-boote, Hedge-boote, Fire-boote, Plow-boote, &c. Is in it self a Saxon word, and the Lord Coke sayd, that it was adjudged *Michelman 25. and 26. Eliz.* in *Dartes Case*, Where it was a custome that the Copy-holder might cut *interims* for to repaire, that if the Lord carry it away, that an Action of Trespass lies for the Tenant; and *Pash. 36. Eliz. Paylers Case*: A man was Tenant by copy of Court Role of wood, and the soyle was excepted to the Lord, and yet the Copy-holder maintained an Action of trespass against his Lord for cutting of wood, And *Trinity 4. Eliz. Stribbles Case*, Copy-holder prescribes to have the Loppings of all the trees growing upon the Copy-hold, and the Lord cut a tree himselfe, and the Copy-holder brought an action upon his case, and adjudged that it lyeth well, and *9 H. 4. Fitz. waste 59. by Hall*, that Tenant by copy of Court Roll cannot make waste, nor cut woods to sell, but for his Benefit in repairing of his Houle, and *2 Henr. 4. 12. a.* It seemes that if a stranger cut a Tree, the Lord may have an Action of trespass, and the Copy-holder another, and every one of these that recover Damages according to his interest, that is, the Lord by his general property, and the Copy-holder for his special property; but appears by *Clark and Pennysfathers case 4 Coke 23. b.* That the Heir of the Copy-holder, may have an Action of Trespass, before admission, by which it appears that the heir doth not take his Estate of the Lord but of his Father: and also agree, that if such an Heire dye before Admission, the Heir may enter, and take the profits, and so it was adjudged that the Action of Trespass brought by the Copy-holder against his Lord was well maintainable.

*Fajche. 1610. 8. Jacobi, In the Common Bench.*

#### *Earle of Rutlands Case.*

**E**ARLE of Rutland Plaintiff in an Action of trespassse upon the Case against *Spencer and Woodward Defendants*, the case was, The last *Queen Elizabeth Anno 42. Eliz.* by her Letters Patents under the great Seale of England, granted to the Earle of Rutland the Office of the custody of the Porter-ship of the Castle of *Norringham*, *Habendum* to the sayd Earl to be executed by him or his Deputy during his natural Life, and further the same *Queen*, by the same Letters



*Letters Patentes*, granted to the sayd Earl, the Office of Stewardship of diverse Mannors, *Habendum & exercendum, cum omnibus feodis, vadiis & proficijs eidem Officio pertinentibus*, to the sayd Earl, from the time that he should be of full age, during his Life, and further the sayd *Queen* granted to the sayd Earle the Office of *Receivership* of diverse Parks and forrests, *Habendum & exercendum Officium predictum cum omnibus & singulis suis proficijs, vadiis, feodis, & emolumentis, quibuscunque, eidem Officio pertinentibus, aut ratione ejusdem percipiendis per se vel sufficientem deputatum suum, &c.* And after in the sayd Patent it is recyted, that the sayd Earl was of full age *Anno 40 Eliz. Ut informamus, mandamus quod omnes & singuli Officij, & alij quicunque sint intendentes & obedientes dicto Commiss, & deputatis suis, in exerendo officium predictum, and if this patent were good or not was the question.*

And *Hinton* serjeant conceived, that the Patent was good, and that the sayd Earl may exercise the sayd Office of Stewardship, for which this Action was brought, by Deputy by force of the sayd Grant.

The first question, which hee moved was, if Steward of a Court may exercise his Office by Deputy, without speciall Grant of that.

Secondly, if there be words within the Patent, to enable him to execute that by Deputy.

Thirdly, if upon this disturbance, action upon the case, *Quare vi & armis*, lies.

And to the first, he conceived, that the *Patentee* may exercise the Office by Deputy without special words of Deputation in the Patent, for he conceived that it is not meerly an Office of trust, for he hath not the keeping of any Records, for the Courts of which he was steward were not Courts of Record, and yet that all the Books are, that ancient grants of Office of stewardship, contain that the *Patentee* may exercise, *Per se, vel per sufficientem deputatum suum*, though they are not of Courts in which the steward is Judge, but the suitors, but if a Grant be of such an Office of Inheritance, then there needs words of *Deputatum*, for here it is apparent, that there was not special trust reposed in the *Patentee*: And he also agreed, that if it be not an Office of profit, the Grantor may enter and out the *Patentee*, but the fee shall remain, as it appears by the 31 H. 8. *Brookes Nevell Case* and 18 Ed. 4. And it was not the intent of the *Queen*, that the Earl of Rutland should execute the Office in person, for that should be an undervaluing of him, the which he sayd was proved by *Sir Robert Vrosbes Case* in the *Commentaries*, where an Officer to the Prince was discharged of his attendance, by

alteration of quality of the Prince, and making of him King, and yet the Fee remained.

And to the second it seems, that the patent hath expresse words of Deputation.

And the third Grant, which hath a reference to the Grant precedent, and al the words being put together make a perfect Grant, and this such construction hath been alwaies made of Grants of the King, as it appears by *Sir John Mullyns Case*, 6 Cokes 56. And *Justice Vindhams case* 5 Coke 7. a. So if the King makes a Lease of a Mannor, except a Grove next to the Mannor, this shal be intended next to the Mannor House, for otherwise it shal be out of the Mannor, and so the exception voyde, but *Coke and Foster* doubted of that.

And to the third point, that the Action was maintainable, *Vi & armis*, for when the Deputy of the Earl, of *Rutland* proclaimed the Court as Deputy of the Earle of *Rutland*, and these Defendants proclaimed that as Stewards of the Earl of *Shrewsbury*, and after adjourned that; and after held all the Courts and received the profits, it seemed to him, that for this ouing and disturbance which is disseisin, action upon the case lies, *Quare vi & armis*, as well as in the Book of Entries 15. two men had Warrens adjoyning, and one of them puts Cags, and other vermine into the Warren of the other to destroy it, and the Action of trespass, *Vi et armis* lyes, and so for menace action of trespass *Vi & armis* lies, as it appears by 3 H. 4. and this disturbance is sufficient to maintain an *Assise*, and upon that he concluded that the Plaintiff in the Action ought to recover, and to have Judgment.

And *Harris* the younger Serjeant argued, that the Grant is not good, for default of certainty, as to this Grant of Stewardship, for the Grant is of the Office of Stewardship of the Mannor of *Mansfeild*, and doth not shew where the Mannor is, nor in what County; and it appears, and is put for a Rule by *Hussey* cheife Justice, in the 25. of H. 7. 60. b. That when a man wil have advantage of Letters Patents of the King, it behooveth that they extend certainly to things of which he wil have advantage, see 2 R. 3. 7. a. By *Hussey* 44 Ed. 3. 17. 5 Ed. 4. *Garters Case*, 17 Ed. 3. 15. and *Doddingtons Case*, which is *Hill*, and *Pewt*, 2 Coke 1. 31. b. If the Town be misnamed it is good, if there be another certainty, but if it be not named at all, otherwise it is. And to the Point moved by *Hutton*, he conceived that this Office of Stewardship could not be exercised by a Deputy, as it appears by *Littleton in his Chapter of Estates* upon condition, where he saith, that there are Estates upon condition in Law, of which Stewardship is one, fol. 89. *Sect.* 379. That cannot make Deputy without speciall Grants, and with this agreed

agreed *Sir Henry Nevills Case* Com. 379. and *Long 5. Ed. 4. 26. b.* and by 21 E. 4. 20. and *Sir Henry Nevills Case* before, he could not grant over his office, but if he do not attend to the Execution of that, it is forfeiture, 11 Ed. 4. so if he wants skill 29 H. 6. 42. *Per totam curiam*, He conceived that the Law doth not make any difference, between the person of an Earl and another, to the executing of this Office, and that the words of the Patent do not contain words of deputatiou, for in the Grant the words are, *Habendum Officium predictum*, breisly written, *Cum omnibus vadis & feodis eidem Officio, sue ratione ejusdem*, &c. The which last words are expository of the first, that is, that it shal be intended that the Office is contained in the last Grant, and shal not be referred to a Grant precedent, in which the Stewardship is contained, and also he conceived that this Action upon the case doth not ly, *Quare vi & armis*, as it appears by *Fitzherberts Natura brevium* 86. H. Where it is sayd, that in trespass upon the case, these words, *Vi & armis* are contained in the Writ, shal be sufficient cause to abate the Writ, see 11 *Affise* 25. He which counsels to make Disseisin, shal not be a Disseisor with force, for he ought to do some manual Act, either to the person or to the possession, see 41 Ed. 4. 24. a. and 44 Ed. 3. 20. b. And so he concluded that this Action is not maintainable, and that Judgment ought to be given for the Defendant for the causes aforesayd.

This Case was argued again by *Nicholls Serjeant for the Plaintiff*, and by *Dodridge the Kings Serjeant for the Defendants*, to the same intent, and it was urged by *Dodridge*, that the Patent contains three severall expresse Grants, which are distinct Grants in themselves, as there be three distinct severall Patents, though they have but one Parchment and one Seale, and if the King grant the Office of parkship of two parks by one self same Grant, if the Patentee be disseised of them, he may have severall *Affises*, though that it be but one self same grant. And he agreed that the words, *officium predictum*, in the 3. grant shall be intended *officium predictum*, and to supply the defect in the second grant, if it were not limitation of the estate in the second grant, but for that, that the second grant was perfect in it self, there need not of necessity any such construction, and that these words shall be referred to the last words, appears by the last words of the *habendum*, that is, *cum vadis & feodis, eidem officio, aut ratione ejusdem officij*, and these Relatives are exposition accordingly. And to the objection of the clause of Assistance in the end of the Patent: he answered that if the grant were ill and void in it self, this Clause doth not supply that. For this is but notification to the Officers of the Queen, that they should be attendant to the said Earl. For though that the Intent of the Queen was, that the Earl of Rutland should execute this office by Deputy, yet this intent shall not

*Nicholls.*



not make the grant good, for though that the Intent of a common person be apparent within the Deed, yet this intent shall not make a voyd grant good, 19 H. 6. 20 H. 6. 22 H. 6. 15. Grant to 2. *Et heredibus*, with warranty to them and to their Heirs, this clause of warranty, though it were the intent of the parties apparent, yet it was not sufficient to make the grant which was voyd good, and so it is in 9 H. 6. 35. Abbot by his deed in the first person grants a Tenement, and the Grantee in the third person, *renunciavit totum Commune quod habuit in uno tenemento*: and though that in this Grant the Intent of the parties is apparent, yet this Intent shall not make the Grant which is void in it self to be good. So if a man makes a Lease for life to the Husband and Wife, and after grants the reversion of the Land that the Husband held for term of life, that grant of the Reversion is void, though that the Intent was apparent, 13 Edw. 3. Grants 63. And so in Patent of the King, grant to a man, and *heredes masculis suis*; is void, though that the Intent also is apparent, that he should have an estate tayle, 18 H. 8. 6. *Estates* 84. But admitting that the Grant may be supplied by the last words, that is, that in the last Grant the words are *officia predicta*, and in the clause of Assistance, yet these words may be supplied, for there are two other Grants, in which there is expresse mention that the *Patentee* may exercise it by Deputy: and so the words shall have full interpretation, *Reddendo singula singulis*. And hee conceived that the Writ shall abate for that, that it contains *Vi & armis*. And also the Declaration; for the Jury have not found any disturbance at all. And he agreed that in some cases, Trespasse *Vi & armis* well lyes, as it is *Fitzh. Na. Bre.* 92. 86. as where it is actuall taking, 45 Ed. 3. 30. 44 Edw. 3. 20. where trespassse *Vi & armis* is maintainable against a Miller for taking of Toll against the Custome, for here is actuall taking, and 8 R. 2. 7. Hosteler 7. In an action of Trespasse, *Vi & armis* against an Host, for that, that certain evill persons have taken the money of the Plaintiff, and good. But where there is not any actuall taking, there the Writ ought not to containe *Vi & armis*, for, for not scowring of a Ditch, or stopping of Water, as it is 43 Ed. 3. 17. But for casting of Dung into a River, action of Trespasse *Vi & armis* lyes, 12 H. 4. But for burning of a house it doth not lye *Vi & armis*, 48 Ed. 3. 25. And so for turning of water-course, 3 H. 4. 5. But in this case there is but disturbance with a word, and commandement to hold a Court, and no Court held, nor no Proclamation made, and so no disturbance at all, 16 Edw. 4. 11. one hath the office of a Parkership, and another man was bound, that he should not disturbe. And in debt upon the Obligation he pleaded that the Obligor hath threatned to disturb him, and adjudged that this is no breaking of the Condition, for there is no disturbance: and in 2 Ed.

3. 27. and 40. *Quo minus* by *Jessery Scarlage*, where the King grants to the Mayor of *Southampton* the Customs of the same Towne, and in *quo minus* for taking of them, it was adjudged that words are no assault, but there ought to be an act done. But in this Case is nothing found but words, and no act done, but it is found that after the Defendants held the Courts. But that doth not appear if it were against the will of the Earl of Rutland or not, and so concludes that the action is not maintainable. And this case was argued again in Trinity Term next ensuing by the Justices, *Daniel* being dead, but I was not present at the argument of *Foster* and *Warburton* Justices: but I heard the arguments of *Walmesley* Justice, and *Coke* chiefe Justice.

And first *Walmesley* conceived that the Grant was good, and that the Earl of Rutland by this Grant might exercise his Office by Deputy, and this only in respect of the quality of his person, for the Patentee is a Noble man, which hath been employed as an Ambassador of the King into other Realms, and this Grant of this Office being amongst others, varies from them; for this wants the word, *exercendum*, which is contained in the others: and also the office of a Steward is too base for an Earl to execute, for the Steward is but as a Clerk, and not a Judge, for he shall not be named in a Writ of false Judgment, nor shall hold plea of any actions but under 40. s. & for that it is not fit nor convenient that an Earl should exercise such a base Office in Person. For if Recovery here be pleaded, it shall be tryed by the Country, 1 *Edw.* 3. And the Steward shall not give Judgment, but the Jurors, and no tryall shal be by Verdict, but by waging Law, and the fee of the Stewards but a 2 d. for every Plaint. And for that it was not the Intent of the Queen that the Earl should exercise such a base office in person, and her Intent is apparent, for that, that the word Exercise is not contained in the Patent. And the Intent of the Queen is to be considered, for the other Offices are fit to be executed by the Earl: for the exercising of them is but a matter of pleasure, as in hunting in the Forrests and Parks of the Queen: and for that if these Grants have not contained words of deputation, the Earl ought to exercise them in person, according to *Littleton*. And Noble men are not to be used as common people, for they are not to be Impannelled of a Jury, and *Capias* doth not lye against him, by which he cannot be outlawed, and for that he shall not be bound to sit in such a base Court, as this base Court is: And all this matter is wel declared and expounded in the last clause of the Patent, where the words are, *Et ulterius volumus & mandamus quod omnes, &c. Sine intendentes & auxiliantes, &c.* Where the words *volumus* in Patents of the King, so amount to as much as *concedimus*, or a Covenant, which is all one with a Grant, as in 32 H. 6. The King releas-

*Walmesley.*

ses all his right in an Advowson, *Nolentes*, that the Patentee shall be grieved or disturbed, and adjudged that this shall amount to a Grant, and so the word *Voluntas*, in the principall-case: and also he conceived that the action is well maintainable, *Vi & armis*, as *Quare Impedis*, for disturbance by word, or presentment by word. And it is also found that the *Defendants* did take all the profits, and that the Deputy of the *Plaintiff* came to the usual place where the Court was kept, and that could not be intended to be out of the Mannor. And so for these reasons he concluded that Judgement should be given for the *Plaintiff*.

Coke.

And Coke cheife Justice argued to the same intent, that is, that the *Plaintiff* ought to have Judgment. And first he conceived, that the Patent is good, notwithstanding the uncertainty, that the Mannors are not named in what Counties they are, either in *England*, *France*, or *Ireland*, for the Mannor is named very certain, by which it may be granted though it be in the Kings case, as it appears by 32 H. 6. 20, where the King grants all Mannors, Messuages, &c. which were parcell of the possessions of *I. S.* attaint, and good. And such grant was made to Charles Brandon Duke of *Suffolke*, and adjudged good, though that the person of a man is more incertain then the Mannor, & yet, *Id certum est quod certum reddi potest*. And 39 Ed. 3. 1. in the Abbot of *Reddings* case, where a grant was made to the Abbot and his Successors, that the Prior and Covent shall take the profits in time of vacation, *Fitz. Na. Bre. 33.b.* And 23 Ed. 3. 20. The King grants to the Queen the Barrony, and all Mannors, &c. till *John* of Gaunt be able to govern himselfe, and that shall be intended till the Law intends him able to govern himself, and Mannor is very certain, of which a view shall be awarded. The second exception which was taken to the grant was, for that, that it was to take effect at the full age of the Earl. And after it is recyted in the *Patent*, that he was of full age before the making of the *Patent*, and so by consequence the *Patent* is to take effect from the time that it was past: And to that he said, that it shall be intended to the profits of the Office only, for it appears by the *Patent* that the Queene had granted it to another during his Minority: That is, the office.

Fee when forfeited.

And to the third matter, That is, if hee cannot make a Deputy, then he hath forfeited the said Office, by the not using of it. And to that he said, it appears by *Waltons* case, 10 *Eliz. Dyer*, fol. 270. That if a man grants a Fee, *pro concilio impendendo*, or keeping of Courts, the Fee shall not be forfeited without speciall request to the Patentee to give Councell, or to hold his Courts, for hee doth not know if the Grantor will have his Courts held or not: and so it is 39 H. 6. 22. *Brewens* case, where it is also agreed, that it shall be no forfeiture of an office without speciall request to hold the Courts, or



to give Councell: But in the case of the Queen otherwise it is, for she ought not to make demand in case of Rent nor Condition, though that it be within the Statute of 32. H. 8. And yet it was argued in Sir Thomas Hennages case, that if the King make a Lease for years upon condition to cease; this shall cease without office upon the breaking of the Condition, but a Lease for life shall not cease without office, though that the Condition be broken: And so if the King grants an Office for life, this shall not be avoided without Office: And he doubted the case of the Lease for yeares: And also he agreed, that the Grantee of a Stewardship, cannot make Deputy to exercise his Office, without speciall words in the Patent: But if the Office be granted to him and his Heires, or to him and his assignes, it is sufficient without other words to make a Deputy: And also he sayd that the word Steward, is the name of an Office, and is derived of Steed and Ward, which are Saxon words, and intend the Keeper of the place, which the party himselfe ought to hold; and it appeares by *Cumdem and Lambers*: And so the word *Senescalls* also signify, for this is but a *Custos seu officarius locis*: See *Fleta liber 2. chap. 72. Senescallum providebit Dominus circumspellum fidelem, Modestum & pacificum qui in consuetudinibus, &c. & iura Domini sui teneri, &c. Quique balivos suos instruere potest, Cujus officium est curia maneriorum, &c.* And a Deputy is a person authorized by the Officer in the name and right of the Officer, and for all that he doth the Officer shall answer, for he is but as a shadow of the Officer: But assignee is in his own right, and he shall answer for himselfe, and forfeiture by assignee of Tenant for life, shall not be forfeiture of the reversion, 39. H. 6. And he agreed that a Marshall, Steward, Constable, Bayliff, and such like cannot make Deputies, without speciall wordes in the Grant, as it appeares, 39. H. 6. 11. Ed. 3. 10. Ed. 4. 14. 17. and 7. 21. Ed. 4. *Nevills case in the Com. and Littleton*: And to the exceptions which have been taken to the Writ and Count, he saith that an Action of Trespasse, which is founded upon the case, doth not lye *Vi et armis*, where the point and cause is Action, is supposed to be made *Vi et armis*, and for that he takes difference between *Causa causans*, and *Causa causata*, for where the matter which is supposed to be done *Vi et armis*, is not the point of the Action: But the cause of the Action there lies very well *Vi et armis*: But wherein the point of Action is supposed to be made *Vi et armis*, there the Writ shall abate: As if a man brings an Action of Trespasse for casting dung into a River, by which his Land is drowned, in this case an Action of Trespasse upon the case, *Vi et armis* lyeth very well, for here the casting in of the Dung, is but *Causa causans*, And the drowning of the Land is *Causa causata*, 8. R. 2. And so disturbance to hold a Leet, by which

Trespas.

he hath lost his offerings 19. R. 2. 52. And the Earle hath election to have Trespasse or Assise, though it be not Manurable: As if a man prescribe to have seven pence of every Brewer which sells strong Beer, for disturbance to have the seven pence, Action upon the case lyes, for this disturbance is Diffesin: 15. Ed. 4. 8. 14. Ed. 3. 4. 1. Ed. 5. 5. 19. R. 2. Action upon the case 51. And to the objection which hath been made, that disturbance found by the Jury, is not the same disturbance, which is mentioned in the Count, for in the Count the disturbance is supposed to be made *Vi & Armis*, but the Jury do not find any disturbance to be made *Vi & Armis*: But this notwithstanding, it seems that the Count is good: As if a Sheriff exerts a franchise and executes a Writ, this is disturbance, and Action upon the case lyes: And so in *Quare Impedis*: And also he sayd, that the Earle cannot make a Deputy but by writing, as it is resolved 28. H. 8. Br. depury 17. Where it is sayd that Deputation of an Office which lyes in Grant, ought to be made by Deed and not by Word: But here the Jury have found, that the Earle hath made his Deputy, this shall be intended in lawfull manner, and cannot be but by writing: And also he agreed that the *Habendum* mentioned in the third Grant, shall extend only to this Grant, which is his proper Grant, that the Office of the *Habendum*: And it appears by *Wrotleys* and *Adams* case, *Comment.* 17. That the Office of *Habendum*, is to make certain the Estate and not the thing granted, for this is the Office of the Premises of the Deed: And if the *Habendum* in the third Grant, had had reference to the second Grant, this would make the Grant void: And in Grants of the King other construction shall be made, as it was adjudged in the Court of Wards, *Michellmasse* 28. and 29. *Elix.* between *Brunker* Plaintiff and *Rephelin* Defendant, where the case was, the King Hen. the 8. had two Mannors, whereof diverse Lands of one Mannor extended the other Mannor, and then the King granted one Mannor and all his Lands in the same Mannor, *Nec non omnes & singulas Terras, &c.* In the same Town, and adjudged that the Lands which were parcell of the other Mannor, which was not granted, passe by this Grant, though that they are in the other Mannor, in the same Town, and he denyed that the words *Precipientes & volentes* shall betaken as a Grant, for they are not spoken to the Patentee, but to other Officers, which are strangers to the Grant: But if the thing granted had been a Chancell, that a Covenant might enure as a Grant, and 10. *Elix.* *Dyer* 270. 22. The King *Phillip* and Queen *Mary*, granted for them and their Heires and Successors, to *A. B.* That he and his Factors and Assignes might Tavern, and keep a Tavern, &c. Commanding all Mayors and Sheriffs, &c. and other Officers and Subjects and their Heires, and Successors, to permit

Grant. *le Roy.*

permitted and suffer the said *A. B.* during his life to hold and use a Tavern, and to sell Wine without Impeachment, and it seemes that the Grant is void, for that that there is not any time limited, for how long it shall indure, and the mandate in the last clause shall not make any limitation, for by the death of the Prince this altogether ceaseth, for *Omne mandatum morte mandantis expirat*: And for that all Proclamations made in time of the Reign of Queen *Elizabeth*, cease and determine by her death: And to the person of the Earle, he said that it was a *Maxime*, that Honour and Order shall be observed, and that was a common saying of the said Queen, and for that it was not her intention, that this *Maxime* should be broken, and that the said Earle should exercise the said Office in person, but she intended the said Earle should overlook the said Mannor, and place here a sufficient able man to exercise the said Office, because he should answer, for the misdemeanour of such a Deputy is the forfeiture of the Office, and he saith that the Dignity of an Earle, was the most high Dignity in this Realm, that any Subject doth possesse, till the 11. *Ed. 3* The black Prince was the 1 Duke, and *Aubry de Vers* the 1 *Marquess* in the 11. *R. 2.* and *Beaumont* the first vicount in the time of *H. 6.* And none of these Dignities are above an Earle in degree, but only in precedency, for *Bracton lib. 1. chap. 8.* saith, *Quod Comes dicuntur a seorsitate, quia Comitantur Regem*: And in ancient time none were made Earles but only those which were of the blood Royall, and this is the reason that they are called *Consanguini Regis*, and also they may be called *Consules* a *Consulendo*, *Tales enim Regis sibi associunt ad consulendum & regendum populum Dei*: And at their creation the King gives to them a Robe and Cap, which signifies Councell, and Corroner, which signifies the greatnesse of his Blood and Honour, and also sword, *Ut sit in utrumque tempus*, as well ready for War as peace: And for that it should be unfit, that one of such Honour, State, and Dignity; should be employed in holding of Court Barons, and there sit to enter Plaints, and have a peny for every Plaint for his paines, and to make Copies and such like base employments which are *Vivida rationes*, which was not the intent of the Queen, that he should exercise the said Office in person, and the Law requires conveniences in all Grants, as in 12. and 13. *H. 8.*

One licensed a Duke to come and hunt in his park, and the Duke came with his Servants and many others of his Retinue, and hunted there, and it was adjudged that the Grant was sufficient, to warrant his hunting in this manner, in respect of the conveniency, for it is not fit and convenient that the Duke should go alone, and 21. *Ed. 3*: 48. The Bishop of *Carlisle* sued the Executors of his Predecessor



for the Ornaments of the Chappel of the sayd Bishoprick: and then recovered, and though that the sayd Chappel was in the private House of the sayd Bishop, yet it was thought fitting, that such Chappel should be adorned with convenient Ornaments, and that these Ornaments should go in succession to the Successors, and not to the Executors, and if conveniency be so required in all these cases, then by the like Reason such inconveniency shall not be admitted, that the Earl should be Clerk to Suitors as every Steward is. And for that he conceived that the Grant is good; And that the sayd Earl may exercise this Office by a Deputy, as well as if a Common person grant an Office of Fostership to the King; he may exercise that by any party, or grant it over, though there be no words of deputation in the Grant, and this in respect of the quality of his person, and in many other cases an Earle or another Noble man shall be privileged, as in 3 H. 6. A Noble man shall not be examined upon his Oath in account, And 48 Ed. 3. 30. He shall not be sworn upon Inquests, which is to serve God and his Country Register 179. And if a common person be in debt to me a hundred pound, I may have a *Capias* and arrest his person for this Debt, but if the King create him Baron or Earl, then his person is so privileged, that that cannot be attached for this Debt, and this is without wrong to me, as it appears by the Countesse of Rutlands case 6. Coke; And if a Baron be returned of a Jury, and if Issue be taken, if he be a Baron or not, this shall be tried by Record whether he be a Baron or not, 35 H. 6. 46. 22 Affise 24. 48 Ed. 3. 8. Register 47. And in case that one common person hath any Office, which he cannot exercise by a Deputy, yet if he be employed in the Kings service, as if he be made Ambassador out of the Realm, or other such employment, he may during his absence make a Deputy, and this shall not be forfeiture of his Office, and an Earl in ancient time was not only a Counsellour of the King, but by his Degree was *Prefectus sive prepositus commitatus*, as it appears by *Cambden* 106, 107. *Comes prefectus Satrapas*, which is *Prepositus comitatus*, and was in place of the Sherif at this day, and when that he was Sherif, though that he had the custody of the county committed unto him, which was a great trust, yet then by the Common Law, he might make an under Sherif which was but a Deputy, the like *Holinsheds Chronicle* 463. Amongst the customes of the *Exchequer*, he called the under Sherif *Sonescallus*, which agreed with the Definition before, for he held the place of Sherif himself, and by the statute of *Westminster* 8. chap. 39. It is sayd that *Vice comes est vicarius commitatus*, and if a Barony descend upon the Sherif, yet he shall continue Sherif, 13. *Elizabeth Dyer and Britton* 43. If a Rybaud strike a Baron or a Knight, he shall loose his Land: And Tenant by Knights service, may execute it by

by Deputy, 7. Ed. 3. *Littleton*: And if it be so in the case of a Sheriff, which hath the County committed to him, that he may make a Deputy by the Common Law, upon that he inferred, that the Steward which hath but the Mannors of the King, committed to him, that he may make a Deputy: And also he said that the words in the last clause, that is, (*Volentes & precipentes*) that the Officers and the Subjects should be attendant, expounds and declares the intent of the Queen, for the words are; *Omnibus premissis*, and the Grant of the Office of the Stewardship is one of the premisses, and so he concluded upon these reasons, that Judgement shall be given for the Plaintiff, and that the Grant was good, and the Action well maintainable: And of this opinion were *Warburton* and *Foster* Justices: And Judgement was given accordingly; this Trinity Term 8. Jacobi.

And *Coke* cheife Justice remembred a Report, made by him and *Popham* cheife Justice of England, upon reference made to them, that this Patent was good, and that the Earle of Rutland, might exercise this Office by Deputation, and he conceived, that there were other words in the Patent which were found by the Jury, that the said Earle should have the said Office, *Cum omnibus Juribus & Jurisdictionibus*, &c. as full. &c. as any other Patent hath been had, and withall the Appurtenances, and it seemed that a former Patentee had power by expresse words to execute that by a Deputy, and he conceived though these words *Adeo plene &c.* do not enlarge the Estate, yet this enlargeth the Jurisdiction of the Officer, as in 43. Ed. 3. 22. Grant is made by the King of a Mannor, to which an advowson is appendant, *Adeo plene, & tam amplis modo & forma*, &c. And these words past the advowson without naming that, and he said it was adjudged *Hillary 40. Eliz.* in *Ameridithes* case, where the case was, the Queen granted a Mannor, *Adeo plene & integre & in tam amplis modo & forma*, as the Countesse of *Shrewsbury* or any other had the same Mannor, and Queen *Katharin* had the same Mannor and diverse liberties with it of great value, during her life, and adjudged that these liberties should passe also by this Patent by these words, and so in the principall case, if the former Patent had been found also by the Jury, and so was the opinion of *Popham* and him, and was certified accordingly.

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